

**Item 9.**  
**Approve Proposed Drug-Free Workplace Policy and Awareness Program**

**September 4, 1998**

**ACTION ITEM**

**SUMMARY:** This item allows the Board to approve a Drug-Free Workplace Policy and Awareness Program. State law requires the State Board for Educator Certification to adopt a policy designed to eliminate drug abuse and its effects in the workplace.

Recommended Changes since the May 1 Board Meeting.

Since the May 1 Board meeting, staff has made recommended changes to the proposed policy to reflect the availability of an Employee Assistance Program (EAP). Both state and federal laws mandating a drug-free workplace policy require the SBEC to advise employees of any available treatment programs.

Staff also recommends a new section providing for a drug-free awareness program to let employees know about the policy, the EAP, and other issues related to a drug- and alcohol-free workplace.

Other recommended changes involve:

- stating that the policy includes temporary and contracted workers, though the policy alone would not entitle them to participate in medical benefits or the Employee Assistance Program; and
- defining a "reasonable belief" that an employee has violated the policy and a "proper and reasonable search" of an employee's work area.

Synopsis of Recommended Policy

Rules of the Texas Workers' Compensation Commission, which oversees the state's drug-free workplace program, require a policy to include the following elements:

- (1) a statement of the purpose and scope of the policy;
- (2) a statement that the policy includes alcoholic beverages, as well as inhalants and illegal drugs. The policy may include prescription drugs;
- (3) a statement of any consequences the employee may suffer if found violating the policy;
- (4) a description of available treatment programs, if any, and how they may be requested, such as assistance provided by the employee's health care insurance or drug and alcohol abuse rehabilitation programs sponsored by the employer;
- (5) the availability of, and the requirements for participation in, drug and alcohol abuse education and treatment programs, if any; and
- (6) a description of any drug testing program that the employer has in force.

As implied by provision (6) above, the agency may have a testing program but is not required to have one. The agency must provide each employee with a written copy of the policy.

Although the SBEC does not currently receive any federal grants, the agency may in the future. Any state agency receiving a federal grant must develop a drug-free workplace program that complies with the Drug-Free Workplace Act of 1988. Such a program includes publishing a statement notifying employees that drug use in the workplace is prohibited and advising them of the consequences of violating the prohibition.

Upon determining an employee has violated the policy, the Executive Director must:

- take appropriate disciplinary action, up to and including termination; or
- require the employee to satisfactorily participate in an approved drug or alcohol abuse assistance or rehabilitation program.

The treatment option to disciplinary action is known as a "supervisory referral" and would become a condition of continued employment with the agency if the employee accepted its terms. A supervisory referral could be offered, for instance, when an otherwise valued employee violates the agency's drug and alcohol policy but does not present a severe, continuing threat of harm to himself or others in the workplace and has not committed a drug-related crime on the agency's premises.

An Employee Assistance Program (EAP) is the most common referral mechanism used by state agencies to help their employees find confidential, professional aid in dealing with drug and other personal problems that affect workplace performance. An EAP counselor can provide direct counseling services to the employee or work with the employee's insurance carrier to secure appropriate covered treatment. Employees may also be able to access treatment through their health insurance plans; For fiscal year 1999, the Board has budgeted \$1,000 for the purchase of EAP services. The staff is in the process of procuring an EAP provider, with services to become available beginning September 1998.

The Executive Director may establish other reasonable procedures and guidelines to implement this policy, including guidelines for having a "reasonable belief" that an employee is violating the policy or for conducting a "proper and reasonable search" of an employee's work area. The policy, however, may be enforced immediately upon approval by the State Board for Educator Certification, without the Executive Director's having established any other procedures or guidelines.

Further, the policy is not a contract; consequently, SBEC staff remain employees at-will.

**STATUTORY AUTHORITY:** Texas Labor Code §§ 411.091-.092 (relating to required drug-free workplace policies); 28 Texas Administrative Code Chapter 169 (relating to the requirements of policies adopted under §§ 411.091-.092, Labor Code); the Drug-Free Workplace Act of 1988 (41 U.S.C. § 701); Texas Education Code (TEC) §§ 21.040(6) (relating to the Board's duty to develop and implement policies clearly defining the respective responsibilities of the Board and staff) and 21.041(a) (relating to the Board's authority to adopt rules for its own procedures).

**EFFECTIVE DATE:** Upon adoption by the Board (scheduled for adoption at the September 4, 1998, meeting).

**PREVIOUS BOARD ACTION:** The Board discussed the proposed policy at its May 1, 1998, meeting.

**BACKGROUND AND SIGNIFICANT ISSUES:** Employees who abuse drugs and alcohol are often less productive than their fellow workers and may frequently miss work, show up late, or perform inefficiently. According to a 1991 report by the Texas Workers' Compensation Commission, employees who misuse drugs and alcohol file five times as many workers' compensation claims and their medical costs are 300 percent higher than other workers. In the event of a workers' compensation claim, the SBEC would have to pay 25 percent of the medical expenses incurred by the employee out of the agency's annual appropriated budget.

Employee Assistance Program (EAP): The agency is planning to subscribe to an EAP, the agency would contract with a private for-profit or nonprofit firm to provide agency employees and their families counseling and referral services. In addition to drug and alcohol problems, an EAP provides services dealing with other issues that may be distracting employees and keeping them from performing at their best, such as the following: psychological and emotional problems; family concerns; and financial or legal difficulties.

The most controversial feature of the proposed policy appears in paragraph B (*Reporting Criminal Violations Required/Searches of Work Area Authorized*) under "Policy Provisions": the Executive Director may have a proper and reasonable search of an employee's work area conducted. As state employees using state-owned property, SBEC staff should not have a reasonable expectation of privacy in their work areas to hide alcohol or unlawful drugs. By acknowledging receipt of the policy and agreeing to abide by its terms, new and current employees would be giving prior consent to such searches. The possession or use of alcohol or drugs in violation of the policy would have to be observed and reported to the Executive Director to warrant a search. The Executive Director may have a supervisor or agency investigator search the implicated employee's work area for alcohol. To conduct a search for illegal drugs, however, the Executive Director would contact the Capitol Police of the Department of Public Safety or the Austin Police Department.

Drug Testing: The proposed policy does not provide for drug testing or screening. Some reasons to test would be to verify that workers are not under the influence of prohibited substances, to reassure workers that their coworkers are safe to be around, and to document the agency's efforts to provide a safe workplace. Reasons not to test include the cost (\$25 to \$28 per person tested); complexities in conducting the tests and assuring chain-of-custody standards; uncertainty over whether cause to test exists; bad effect on employee morale; and risk of lawsuits over invasion of privacy, discrimination, and defamation. Because the SBEC is a governmental and not a private employer raises additional constitutional concerns over possible civil-rights violations.

The policy is not a rule and so does not need to be submitted to the State Board of Education for review pursuant to TEC §21.042.

**FISCAL IMPACT:** About \$1,000 a year to subscribe to an Employee Assistance Program. Minimal administrative costs related to distributing drug-awareness information to employees.

**BENEFIT STATEMENT:** Adopting a policy prohibiting drug and alcohol use on the job and promoting a drug-awareness program will enhance workplace safety, adherence to job duties, and work quality and efficiency.

**PROCEDURAL AND REPORTING IMPLICATIONS:** The agency must provide the Texas Workers' Compensation Commission with a copy of the policy for the purpose of a compliance audit, no later than 30 days after the receipt of a written request.

**PUBLIC COMMENTS:** None.

**EXECUTIVE DIRECTOR'S COMMENTS:** Although the SBEC does not currently have a problem with substance abuse in the workplace, the Board's adopting this policy will send a clear message to new employees that such behavior will not be tolerated. A fringe benefit of the proposed policy for all staff, however, is the agency's engaging the services of an Employee Assistance Program, which will provide employees services to deal with many problems--not just those involving alcohol or drugs--that interfere with their job performance.

**EXECUTIVE DIRECTOR'S RECOMMENDATION:** I recommend approval of the proposed workplace substance abuse policy.

Respectfully submitted,

Pamela B. Tackett  
Interim Executive Director

**Staff Member(s) Responsible:** Dan Junell, General Counsel

**Attachment:** Proposed Workplace Substance Abuse Policy

## ATTACHMENT I.

**Drug-Free Workplace Policy and Awareness Program**Policy Statement

It is the policy of the State Board for Educator Certification to maintain a drug- and alcohol-free workplace by prohibiting agency employees from unlawfully or inappropriately manufacturing, selling, distributing, dispensing, transferring, possessing, using, or being under the influence of drugs or alcohol while on duty.

Purpose

The purpose of this policy and program is to accomplish the following:

- to provide a safe, healthy, and productive job environment free from the ill effects of drug and alcohol use;
- to inform employees of: (1) the dangers of drug and alcohol use on the job; (2) the requirement to maintain a drug-free workplace; and (3) the consequences of violating the policy; and
- to comply with Texas Labor Code §§ 411.091-.092 (relating to required drug-free workplace policies); 28 Texas Administrative Code Ch. 169 (relating to the requirements of policies adopted under §§ 411.091-.092, Labor Code); and the Federal Drug-Free Workplace Act of 1988 (41 U.S.C. § 701) (relating to drug-free workplace policies required of federal grantees) as well regulations and guidelines promulgated pursuant to such act.

Scope and Applicability

This policy applies to all employees of the State Board for Educator Certification at all locations where and at all times when on duty or expected to report for duty.

In addition to the employee's work hours, being on duty includes the following circumstances:

- being on the agency's premises or using agency property;
- attending any public function at which the employee is representing the agency;
- attending any public function for which the employee expects to be reimbursed for expenses by the agency; or
- participating in any agency-sponsored event or activity for which alcohol use or possession has not been authorized by the Executive Director.

This policy does not apply to authorized use or possession of alcohol at social events, such as agency-sponsored picnics or social functions held off the agency's premises.

This policy also applies to temporary and contracted workers, though this policy alone does not entitle them to participate in medical benefits or the Employee Assistance Program.

The term "drugs" includes alcohol, inhalants, and prescription medications.

The term "reasonable belief" means a supervisor's judgment based on observation of an employee's behavior, job performance, physical evidence, or other objective facts or circumstances that would cause a reasonable person to believe that an employee is under the influence of drugs or alcohol while on duty. As used in this definition, "other objective facts or circumstances" may include involvement in an accident or

a documented record of being tardy, being absent for extended periods during the work day, or leaving work early without plausible excuses.

The term "proper and reasonable search" means that, after forming a reasonable belief an employee is violating this policy, a supervisor may have an agency investigator search the implicated employee's work area for alcohol; or the Executive Director may have the Capitol Police of the Department of Public Safety or the Austin Police Department search the work area for illegal drugs.

## Policy Provisions

### **A. Using Drugs or Alcohol while on Duty Is Strictly Prohibited.**

Each employee shall abide by the terms of this policy as a condition of employment. Each employee shall be given a copy of the policy and shall sign an acknowledgement of receipt, which shall be retained by the agency and made readily accessible.

Unless provided elsewhere by this policy, employees shall not unlawfully or inappropriately manufacture, sell, distribute, dispense, transfer, possess, use, or be under the influence of drugs or alcohol while on duty. Employees shall not report for duty while unlawfully or inappropriately under the influence of drugs or alcohol.

The misuse of legal drugs prescribed by a licensed physician as part of a duly authorized medical treatment program is prohibited.

A supervisor who has a reasonable belief that an employee is using drugs or alcohol in violation of this policy shall report such improper use to the Executive Director.

### **B. Reporting Criminal Violations Required/Searches of Work Area Authorized.**

Each employee shall notify the Executive Director of any conviction for a drug-related offense occurring while on duty not later than five days after such conviction.

The Executive Director may have a proper and reasonable search of an employee's work area conducted if a violation of this policy is observed. Any employee who observes a violation of this policy shall immediately report such violation to the appropriate supervisor, who shall advise the Executive Director.

### **C. Consequences of Violating this Policy.**

Violations of any part of this policy may result in disciplinary action, up to and including termination.

Within 30 calendar days of receiving notice of any employee's use of drugs or alcohol in violation of this policy or conviction for a drug- or alcohol-related offense while on duty, the Executive Director shall take one of the following actions with respect to the employee found to have violated this policy or to have been so convicted:

- take appropriate disciplinary action, up to and including termination; or
- require the employee to satisfactorily participate in a drug or alcohol abuse assistance or rehabilitation program approved for such purpose by the appropriate governmental administration, including the agency's Employee Assistance Program.

Regardless of any provision of this policy or another, the agency may take appropriate disciplinary action even if the employee is undergoing drug or alcohol treatment.

Section (D) of this policy related to the Employee Assistance Program describes additional conditions of employment and consequences of violating the policy.

**D. Employee Assistance Program.**

Alcoholism and other drug addictions are recognized as diseases responsive to proper treatment, and the Executive Director will make treatment an option in appropriate circumstances as long as long as the employee cooperates and participates satisfactorily. Employee Assistance Program (EAP) services will be made available to assist employees.

The agency will provide employees and eligible family members with confidential, professional assessment and referral services for help in resolving or finding treatment for problems with alcohol, drugs, or other personal problems adversely affecting their job performance. Confidential assessment and referral services will be provided without cost to the employee or eligible family member. The cost of treatment, counseling, or rehabilitation resulting from an EAP referral will be the responsibility of the employee. The EAP counselor may assist the employee in determining how the rehabilitation costs can be paid. In most instances, the employee's medical benefit plan can be used.

Pursuant to Section (C) of this policy relating to Consequences of Violating this Policy, the Executive Director may refer an employee to the EAP in lieu of immediate disciplinary action. As a condition of referral, the employee shall sign a release-of-information consent form. This release will allow the EAP counselor to tell the Executive Director whether the employee cooperated with counselor's recommendations and satisfactorily participated in any treatment program. Should the referred employee not cooperate with the counselor or satisfactorily participate in any treatment program, the employee is subject to disciplinary action, up to and including termination.

Employees and eligible family members are encouraged to refer themselves to the EAP. When employees or eligible family member seek EAP services, their status and problem-solving actions will remain confidential.

Whether initiated by a supervisory referral or a self-referral, EAP-related activities will be treated the same as other personal business or health matters with regard to using accrued leave time. Sick leave may be taken as needed, but taking compensatory time must be pre-approved in accordance with the agency's leave policy.

Regardless of any provision of this policy or another, the agency may take appropriate disciplinary action even if the employee is engaged with the EAP services or any treatment or rehabilitation program.

**E. Drug-Free Awareness Program.**

The agency will establish a drug-free awareness program for employees and supervisors to educate them about the dangers of alcohol and other drug abuse in the workplace. The agency will provide employees with literature and other materials to warn them about the dangers of alcohol and other drug abuse in the workplace.

The agency will provide each employee a copy of the agency's drug-free workplace policy, which also sets forth the consequences for violating the policy. The agency will also furnish each employee with information regarding any employee assistance program available to employees.

**F. [D.] Executive Director May Establish Procedures.**

The Executive Director may establish other reasonable procedures and guidelines to implement this policy, including guidelines for having a "reasonable belief" that an employee is violating the policy or for conducting a "proper and reasonable search" of an employee's work area. This policy, however, may be enforced immediately upon approval by the State Board for Educator Certification, without the Executive Director's having established any other procedures or guidelines.

**G. [E.] At-Will Employment Status Not Affected.**

The provisions of this policy are guidelines; accordingly, this policy is not a contract and does not abrogate the at-will employment status of any employee. Regardless of any part of this policy or another, the agency may terminate any employee for any reason or for no reason at any time, with or without notice, in compliance with law.

**H. [F.] Provisions Severable.**

If any part of this policy is voided by action or decision of a proper authority, any remaining parts shall continue to be in full force and effect.