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August 2, 1999

MEMORANDUM

TO: Federal Agencies

FROM: Interagency Coordinating Group (ICG) Executive Committee

SUBJECT: Guidelines For Selection of Testing Designated Positions (TDPS)

Guidance for Selection of Testing Designated Positions (TDP's)

I. Purpose

This memorandum is the primary reference for agencies selecting TDP's under the Federal Drug-Free Workplace Program established pursuant to Executive Order No. 12564, issued September 15, 1986. It supercedes, by combining and updating two previous ICG memoranda: "Guidance For Selection of Testing Designated Positions" issued by the ICG Executive Committee on January 24, 1992, and "Supplement to Guidance for Selection of Testing Designated Positions" issued by the ICG Executive Committee on June 10, 1993.

The purpose of this document is to consolidate changes resulting from court decisions into guidance for selection of TDP's, to provide agencies with a guide for their examination of TDP's, and to simplify the steps necessary to make changes to agency testing programs. Principally, the approval process is eased by establishing a core group of TDP's as presumptively to be included in all plans. Any agency desiring to exclude any of those TDP's must present justifications for doing so. This new guidance also eases review requirements when agencies include certain other positions in their drug plans. Where consultative review is required, it will be accomplished by members of the ICG Executive Committee under the authority of the Office of National Drug Control Policy (ONDCP). ONDCP assumed lead oversight and policy responsibility for Executive Order 12564 in March of 1991 by designation of the President. This guidance supplements and, to the extent there is a conflict, supersedes previous guidance on TDP's.

II. Background

In the early stages of the implementation of Executive Order 12564, Federal agencies were provided a decision guide entitled *Drug Testing of Sensitive Positions, Optional Decision Guide for Selecting Testing Designated Positions*, to assist them in identifying the "pool" of personnel potentially subject to random testing and in selecting from that pool the TDP's. The analysis in that guide centered upon the criteria of section 7(d) of the Executive Order. By applying these criteria, agency identified the pool of sensitive positions which might be made subject to random drug testing. At the time the Executive

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Order was issued, all positions satisfying these criteria appropriately could be designated for testing. Since that time, however, the Executive Order has been upheld and TDP selection rationales for random testing at federal agencies have been examined and narrowed by the courts through the years of litigation and numerous judicial opinions. Although they remain instructive in developing TDP's, the Decision Guide and Section IX of the Model Drug-Free Workplace Plan developed by the ICG should be used only consistent with the guidance.

One of the primary goals in the President's designation of ONDCP as the lead agency in coordinating implementation of Executive Order 12564 is the identification of appropriate areas where consistency in agency plans is warranted. With the clarity resulting from this multitude of court decisions, it is possible to identify TDP's that no longer need to be submitted for consultative review to the ICG Executive Committee because the criteria for such designations are unambiguous.

III. Current Legal Framework

Through litigation of agency programs, the courts have defined some limits on TDP justifications. As a result of these decisions, this guidance provides lists of presumptive, preferred, discretionary and disfavored TDP's. There is still a substantial gray area outside of the presumptive and preferred categories in which TDP's could be justified based upon the unique facts of a particular agency. Agency counsel should review the latest cases when proposing changes or additions to their TDP's. However, the most significant and instructive cases in this field continue to be the early pronouncements of the United States Supreme Court in *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). Additionally, the Supreme Court has upheld the constitutionality of drug testing programs in other contexts, such as interscholastic athletics. See *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

A. Presumptive Testing Designated Positions.

In Light of the well developed law and clear public interest applicable to the testing of certain categories of positions, these positions set forth below are approved for inclusion in agency testing plans without prior approval of the ICG Executive Committee. In order to improve consistency, it is essential that individual agencies include all positions in these categories in their plans unless very compelling reasons exist not to do so. Indeed, almost all agencies already test these positions. Since courts have consistently found that testing of these safety sensitive positions is justified, agencies need not submit for consultative review their plan to include these positions as TDP's. However, an information copy of implemented changes should be forwarded to the ICG Executive Committee. If an agency head is of the opinion that the unique circumstances of that agency warrant the exclusion of all or some of the positions in these categories, these circumstances should be presented to the ICG Executive Committee for consultative review. The positions that are to be included in every plan if such positions exist in the agency are the following:

1. Employees who carry firearms.

NTEU v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384, 1393-94 (1989). This category was narrowed from "employees authorized to carry firearms" in order to distinguish various investigators and guards who do not carry a firearm on a daily basis, but are merely authorized to carry firearms. Employees in the latter category should be placed in the

appropriate preferred TDP category. However, employees who actually carry firearms on a daily or regular basis are included in this presumptive category and should be in all TDP pools.

2. Motor vehicle operators carrying passengers.

NTEU v. Yeutter, 918 F.2d 968, 972 (D.C. Cir. 1990). *AFGE v. Skinner*, 885 F.2d 884, 889 n.8 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 923 (1990). This category also includes operators of motor vehicles weighing more than 26,001 pounds and operators of motor vehicles transporting hazardous materials. *Intern. Broth. of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991). Note: Department of Transportation regulations implementing the Omnibus Transportation Employee Testing Act of 1991, require random testing for drugs and alcohol of federal employees who operate vehicles that require a commercial driver's license. A commercial license is required for vehicle operators who: (1) carry 16 or more passengers; (2) transport hazardous materials; or, (3) operate vehicles weighing 26,001 pounds or more.

3. Aviation flight crew members and air traffic controllers.

Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990). *AFGE v. Skinner*, 885 F.2d at 889 n.8.

4. Railroad operating crews.

Skinner v. RLEA, 489 U.S. 602, 109 S. Ct. 1402 (1989). *RLEA v. Skinner*, 934 F.2d 1096 (9th Cir. 1991). *AFGE v. Skinner*, 885 F.2d at 889 n.8.

B. Preferred Testing Designated Positions.

The well developed law and clear public interest applicable to drug testing make it evident that the categories set out under this section represents strong government interests for drug testing and will almost always need established judicial standards. However, inclusion of the following positions as TDP's is not presumptive. To ensure reasonable uniformity, agencies will still need to present for consultative review agency-specific justifications for testing of these positions. Agencies choosing to exclude positions of functions specified below from drug testing are required to explain the decision not to designate one or more of these positions as TDP's to the ICG Executive Committee.

1. Certain Health and Safety Positions.

The first major category includes certain health and safety responsibilities that could cause immediate, substantial physical injury if carried out under the influence of drugs, usually involving a potentially dangerous instrument or machine. These positions are:

a. Employees authorized to carry firearms.

NTEU v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384, 1393-94 (1989). This category was changed from "employees having access to firearms." In many cases, there are guards or security personnel who do not regularly carry a firearm, but are authorized to carry one in some circumstances, e.g. emergencies. The rationale for including these positions as TDP's is the same as employees with a security clearance who see classified documents only rarely--granting security clearances in advance proved flexibility and ensures employees can be given access to classified material as soon as the need arises. See

Harmon v. Thornburgh, 878 F.2d 484, 492 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990).

b. Railroad employees engaged in safety sensitive tasks.

This includes persons engaged in handling train movement orders, safety inspectors and those engaged in maintenance and repair of signal systems. *Skinner v. RLEA*, 489 U.S. 602, 109 S. Ct. 1402 (1989). *RLEA v. Skinner*, 934 F.2d 1096 (9th Cir. 1991). *AFGE v. Skinner*, 885 F.2d at 889 n.8.

c. Aviation personnel.

This includes flight attendants, flight instructors, ground instructors, flight testing personnel, aircraft dispatchers, maintenance personnel, aviation security and screening personnel, and aircraft safety inspectors. *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990). *AFGE v. Skinner*, 885 F.2d at 889 n.8. In 1992, two federal district courts in California considered challenges to Air Force and Navy TDP's respectively. In *AFGE v. Wilson*, 5-89-1274 (E.D. Cal. Aug. 17, 1992), the Air Force had included an employee who made tools used by aircraft mechanics to maintain and repair their aircraft. The court held that the danger of a defective tool causing a crash was too remote to support random testing. Only Air Force employees with direct aircraft maintenance responsibilities were approved for random testing. In *AFGE v. Cheney*, C-89-4443 (N.D. Cal. Aug. 14, 1992) a different court considered several categories of employees who performed maintenance on Navy ships, submarines and planes. Those approved as TDP's were able to show a nexus between the work performed and a "compelling government interest in safety," such that small errors or momentary lapses could have "catastrophic consequences for crew members." This case highlights the principle that agencies may randomly test employees with direct and critical responsibilities for maintenance, but not those in general support roles.

2. Presidential Appointees Requiring Senate Confirmation (PAS).

The second major preferred category involves presidential appointees requiring Senate confirmation (PAS). While including PAS positions as TDP's is strongly preferred, one category may qualify for an exclusion. A few agencies have part-time presidential appointees who sit on commissions or boards that meet only three or four times a year. An agency head may determine that random testing of these appointees is impractical.

3. Front Line Law Enforcement Personnel.

The third major preferred category is front line law enforcement personnel with proximity to criminals, drugs, or drug traffickers. These positions include guard and law enforcement personnel who have access to firearms (but do not carry weapons or otherwise meet the standards for a presumptive TDP) and those directly involved in drug interdiction duties. *Von Raab*, 109 S. Ct. at 1393-94; *Guiney v. Roache*, 873 F.2d 1557 (1st Cir.), *cert. denied*, 110 S. Ct. 404 (1989).

4. Drug Rehabilitation Employees.

The fourth major preferred category is drug rehabilitation or equivalent employee assistance duties so inimical to illegal drug use that such employees can expect inquiry into their fitness. These positions include direct service staff of alcohol and drug abuse treatment centers. *NFFE v. Cheney*, 884 F.2d 603, 614 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990). Although some agencies believed that all employees associated with the drug program should be included in the random testing pool, the courts have taken a narrower view. In *NFFE v. Cheney*, the court approved drug counselors with direct client contact as TDP's; however, it refused to approve either drug laboratory testing personnel or to those employees in the biochemical chain of custody. Regarding the latter two categories, the court found an insufficient nexus between a drug-related lapse and any irreparable harm. Based on the holdings of this case, only drug program employees who have direct client contact should be included as TDP's. Unless supervisors of drug counselors meet this test, they should not be included as TDP's. In addition, computer employees who help select personnel for random tests do not qualify as TDP's. The court was

not persuaded that the "credibility" or "integrity" of the drug testing program justified random testing for every employee associated with drug testing.

5. Personnel Having Access to "Truly Sensitive Information."

The fifth major preferred category is personnel having access to "truly sensitive information," for example, national security material that it is reasonable to assume may damage national interests if compromised. *Von Raab*, 109 S. Ct. at 1396. Specifically, these positions include:

a. Top secret and higher clearances>

Harmon v. Thornburgh, 878 F.2d 484, 492 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990). *AFGE Local 1533 v. Cheney*, No. 90-15834 (9th Cir. Sept. 11, 1991)

b. Secret Clearances.

Hartness v. Bush, 919 F.2d 170, 173 (D.C. Cir. 1990), *cert. denied*, 59 USLW 3865 (U.S. 1991).

C. Discretionary Designations

In addition to the categories of positions identified for presumptive and preferred inclusion in agency plans, there are other agency specific sensitive positions which may warrant designation for testing. The presumptive and preferred testing categories are not exhaustive of TDP's supported by case law. For example, courts have supported testing for: confidential security clearances holders, *NTEU V. Hallet*, No. 86-3522 (E.D. LA. Feb 7, 1991); health care professionals responsible for direct patient care, and firefighters, *afge v. Derwinski*, 777 F. Supp. 1493 (N.D. Cal. 1991). Other federal district courts also have upheld random testing for medical doctors (except for doctors performing research or administrative duties), nurses, nursing assistants, pharmacists, and medical technicians because they were involved in direct patient care. Moreover, many TDP's that have not been court tested are also appropriate as required by agency needs. To the extent agencies identify these kinds of positions for TDP's, the agency must submit Appendix A of its plan with supporting documentation to the ICG Executive Committee for consultative review. The agency's plan must contain a statement indicating the necessary causal connection between the employee's duties and the feared harm for each TDP.

D. Specifically Disfavored Testing Designated Positions

It is possible to identify positions which uniformly have been found by the courts not to warrant *random* testing. If an agency has TDP's based solely on the criteria below, exceptional justifications will be required to be submitted to the ICG Executive Committee for consultative review. These positions are:

1. Positions designated based upon the need to foster public trust or generalized requirements for integrity, honesty, or responsibility. *NTEU v. Yeutter*, 918 F.2d 968, 972 (D.C. Cir. 1990)
2. Positions designated based upon access to sensitive information not meeting the "truly sensitive" criteria, e.g. personnel files, budget and financial information, and grand jury information also is inadequate. *Harmon v. Thornburgh*, 878 F.2d 484, 492 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990). Many questions were raised about including inspector general employees because of their access to sensitive information and budget or financial employees because of their influence on large sums of money. Under present case law, neither group qualifies as a TDP. The rationale for excluding inspector general employees is contained in the *Harmon case*. In *Harmon*, the court approved employees with top secret clearances as TDP's because of their access to "truly sensitive" information, but it refused to approve as TDP's federal prosecutors or employees with access to secret grand jury proceedings. The court stated that "truly sensitive" does not include all information which is confidential or closed to public view. The rationale for excluding budget and financial employees is found in

AFGE v. Carazoes, 721 F. Supp. 1361 (D.D.C. 1989), where the court refused to approve as TDP's a group of computer employees involved with billions of dollars of government resources who might be subjected to bribery, fraud, waste or mismanagement. The court concluded that program information which affects large sums of money does not necessarily mean the information is "truly sensitive". The clearest examples of "truly sensitive" remain information requiring a top secret clearance, where by definition, national security would be seriously damaged by an unauthorized disclosure.