

TENNESSEE VALLEY AUTHORITY

CHATTANOOGA, TENNESSEE 37401
6N 38A Lookout Place

March 2, 1990

Mr. James M. Taylor
Executive Director for Operations
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

Dear Mr. Taylor:

In the Matter of
Tennessee Valley Authority

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Docket Nos. 50-259 50-390
50-260 50-391
50-296 50-438
50-327 50-439
50-328

RESPONSE TO REQUEST FOR INFORMATION REGARDING TVA'S COMPLIANCE WITH 10 CFR PART 26

This letter responds to Suzanne C. Black's letter of January 29, 1990 requesting that TVA re-evaluate its handling of preliminary positive test results and inform the Commission how TVA will achieve compliance with Part 26. TVA believes it is in compliance with Part 26. TVA has directed its response to you because we are concerned that the January 29 letter reflects an interpretation of Part 26 which seems inconsistent with protection of the public health and safety.

The question is whether the new Fitness for Duty rule requires TVA to change its practice of removing individuals from work activities after a preliminary positive test result for certain illegal drugs and placing them in a short-term nonwork pay status. TVA believes that if a drug screen results in a preliminary positive test for cannabinoids or cocaine, substances which are not only illegal but may render performance unpredictable, then the reliability and trustworthiness of the employee is sufficiently in question that the employee's access to TVA nuclear facilities should be temporarily withdrawn pending confirmation of the test result. TVA strongly believes that this action is necessary in the interest of public safety and that it is defensible under the law, including Part 26 of the NRC's regulations. In short, TVA believes that this practice enhances safety and meets the requirements of 10 CFR Part 26.

Removal from work activities occurs when preliminary tests are positive for the illegal drugs of cannabinoids and cocaine.* TVA's historical data indicates a high confirmation rate for these two illegal substances.

* Upon the detection of alcohol in excess of the cut-off limit specified in Part 26, TVA immediately performs a second breath analysis to confirm the preliminary result. In cases where confirmation by blood analysis is requested, the two breath analyses are treated as preliminary results and the procedure described above is followed.

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From October 13, 1987 through February 23, 1990, 61 tests were initially positive for cocaine and 56 of those preliminary results were confirmed--a confirmation rate of 92 percent. During that same period, 159 tests were initially positive for marijuana; 137 of those tests were subsequently confirmed, resulting in a confirmation rate of 86 percent. This high confirmation rate constitutes substantial credible evidence that an individual is using cocaine or cannabinoids. Based on this data, TVA believes that, in view of its responsibility to ensure that the public health and safety is adequately protected, the preferable and safety-conscious course of action is to temporarily withdraw the access of an individual who has a preliminary positive result for cannabinoids or cocaine and place that person in a nonwork pay status pending confirmation of that test result.

TVA does not view placement in nonwork pay status as a disciplinary action. In the infrequent event a preliminary positive test result is not confirmed, the individual is restored to work status with no loss of pay or leave, and there is no record or notation maintained in either the individual's personnel or security files as to the preliminary positive test result. Further, no persons other than those authorized by Section 26.24(d) and, of course, the individual, are explicitly informed of the preliminary positive test result. TVA recognizes that in some circumstances, co-workers or immediate supervisors may assume that an individual has had a preliminary positive test result; however, TVA line management is not told of the preliminary positive test result and other disclosure is limited to that permitted by Part 26. TVA's procedure, which is described in the Enclosure, has been designed to allow disclosure of test results only to authorized individuals, while removing an individual from work activities who could potentially endanger public health and safety. The procedure is self-executing and requires no management directive to implement.

TVA bases its judgement as to the permissibility of its practice regarding preliminary positive test results on several factors. First and foremost, Part 26 does not prohibit the removal of persons from work activities pending confirmation of a preliminary positive test result. In fact, Section 26.27(b)(1) states that "[i]mpaired workers, or those whose fitness may be questionable, shall be removed from activities within the scope of this Part, and may be returned only after determined to be fit to safely and competently perform activities within the scope of this Part." Our historical data and experience cause us to conclude that the fitness of workers with a preliminary positive test result for cannabinoids or cocaine is indeed questionable, and that temporarily removing the individual from work activities is warranted.

Second, TVA's handling of preliminary positive test results is in compliance with other related provisions of Part 26. Section 26.24(d) states that "[a]ccess to the results of preliminary tests must be limited to the licensee's testing staff, the Medical Review Officer, the Fitness-for-Duty Program Manager, and employee assistance program staff when appropriate."

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Consistent with this requirement, only TVA's testing staff, the appropriate Medical Review Officer, the Fitness for Duty Program Manager (or alternate designees appointed in writing) and, of course, the individual, have actual knowledge that a preliminary positive test result has occurred. There is no specific knowledge, even among TVA's testing staff and the Medical Review Officer, as to the actual levels of the drugs tested for. Section 2.7(g)(2) of Appendix A to Part 26 states that "[p]resumptive positive results of preliminary testing at the licensee's testing facility will not be reported to licensee management" and Section 2.9 (a) and (c) of Appendix A require the Medical Review Officer to confirm all test results prior to informing licensee management. As previously noted, preliminary positive test results are not reported to TVA management.

TVA has also examined the Statements of Consideration to Part 26 (published at 54 Fed. Reg. 24,468 - 24,494), NUREG-1354, "Fitness for Duty in the Nuclear Power Industry: Responses to Public Comments", and NUREG-1385, "Fitness for Duty in the Nuclear Power Industry: Responses to Implementation Questions." These sources do not indicate that temporary withdrawal of access and placement of an individual in a nonwork pay status pending confirmation of a preliminary positive test result is prohibited by the final rule. Rather, the NRC recognizes that circumstances warranting removal may exist, and "... therefore [Part 26] allows licensees to remove workers from unescorted access prior to confirmation of positive results when such action appears to be prudent, and may be based on information other than the screening test."*

In its Part 26 rulemaking, the Commission identified confidentiality interests of workers, the unreliability of screening tests, and concern for licensee misuse as the principal reasons why access to preliminary test results is limited to those persons identified in Section 26.24(d).** TVA shares the NRC's concern on these matters. As described in the Enclosure, TVA uses its Central Laboratory facility in Chattanooga to perform preliminary analyses of specimens. TVA's high rate of confirmation of preliminary positive test results for cannabinoids and cocaine support the quality and reliability of TVA's testing process and results. The procedure TVA follows in cases of a preliminary positive test result is structured in such a way to discretely maintain the confidentiality of the test result and the privacy of the individual involved. TVA believes that the potential for misuse of preliminary results is remote since this information is so closely guarded.

It is my hope that this letter has clarified TVA's handling of preliminary positive test results to the Commission's satisfaction and that TVA has demonstrated that its Fitness for Duty program meets the letter and spirit of Part 26 and is the appropriate course of action in view of TVA's responsibility to ensure that the health and safety of the public is adequately protected. If you have any remaining reservations regarding the compliance of this aspect of Nuclear Power's Fitness for Duty program, I would

* NUREG-1354, Response to Comment 12.2.10.

** See, e.g., NUREG-1354, Response to Comments 10.6.1, 14.1.3, 14.2.5; NUREG-1385, Response to Question 5.15.

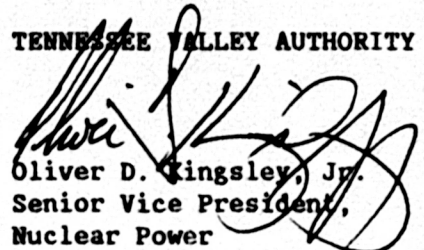
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welcome a meeting between the senior staffs of our organizations to discuss this issue. Such a meeting can be arranged by contacting Mark O. Medford, Vice President, Nuclear Technology and Licensing, at (615) 751-4776.

Very truly yours,

TENNESSEE VALLEY AUTHORITY



Oliver D. Kingsley, Jr.
Senior Vice President,
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Enclosure
cc: See page 5

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cc (Enclosure):

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ENCLOSURE

Other than in for cause and followup testing situations, TVA's Medical Services organization conducts the preliminary analysis of a specimen in its Central Laboratory in Chattanooga.*

If a preliminary analysis is suspect for cannabinoids or cocaine, TVA's testing staff reports the preliminary positive test result to the appropriate TVA Medical Review Officer, who in turn reports the preliminary positive test result orally to the Alternate Fitness-for-Duty Program Manager.

The Alternate Fitness-for-Duty Program Manager instructs the appropriate Site Human Resource Officer to place the individual in a nonwork, pay status but provides no explanation as to why this action is being taken.

After receiving this instruction, the Site Human Resource Officer instructs the individual's management supervisor to locate the individual onsite and escort the individual to the Medical Office. No explanation for this instruction is provided to the management supervisor.

The Medical Review Officer meets privately with the individual to explain the preliminary positive test result and, upon the conclusion of this conversation, sends the individual to the onsite Human Resource office.

The Site Human Resource Officer provides the individual with a letter informing the individual of the temporary withdrawal of access authorization and his or her placement in nonwork, pay status. The Human Resource Officer also ensures that the individual leaves Nuclear Power property.

After the individual has left the site, the Alternate Fitness-for-Duty Program Manager notifies the Personnel Security Manager that the individual has left Nuclear Power property and requests that plant access be temporarily withdrawn. No explanation is given that this action relates to fitness for duty. The Personnel Security Manager complies with this request by temporarily withdrawing the individual's plant access as an administrative action.

* A preliminary positive test result for alcohol results in the performance of a second breath analysis on another evidential-grade breath analysis device, allowing for the immediate confirmation of the preliminary positive test result. If the test for alcohol is confirmed in this manner and the individual does not request further confirmation by blood analysis, the alcohol test is declared positive and the Medical Review Officer is notified. If a blood analysis is requested, the two breath analyses are treated as preliminary results, and the procedure described above is followed.