



Tennessee Valley Authority, 1101 Market Street, Chattanooga, Tennessee, 37402

FEB 28 1991

U.S. Nuclear Regulatory Commission
ATTENTION: Document Control Desk
Washington, D.C. 20555

Gentlemen:

In the Matter of	)	Docket Nos.	50-259	50-390
Tennessee Valley Authority	)		50-260	50-391
	)		50-296	50-438
	)		50-327	50-439
	)		50-328	

FITNESS FOR DUTY (FFD) PROGRAM PERFORMANCE DATA

In accordance with 10 CFR 26, 71(d), enclosed is TVA's FFD Program Performance Data for the six-month period of July 1 through December 31, 1990. Enclosures 1 through 4 contain the performance data and summary of TVA management actions for TVA's nuclear plant sites (Browns Ferry, Sequoyah, Watts Bar, and Bellefonte). The data for TVA's Nuclear Power corporate organization (primarily employees assigned to Chattanooga and Knoxville) is consolidated as Enclosure 5. Enclosure 6 consists of an initial decision by an Merit Systems Protection Board judge concerning management action taken for a FFD violation. The rate of random drug and alcohol testing used by TVA is designed to be conducted at an annual rate equal to 100 percent of the workforce subject to random testing.

There were no FFD events reported to the NRC pursuant to 10 CFR 26.73 during this six-month reporting period.

If you have any question concerning this information, please telephone Charles R. Davis at (615) 751-7509.

Very truly yours,

TENNESSEE VALLEY AUTHORITY

Mark J. Buzzynski for
E. G. Wallace, Manager
Nuclear Licensing and
Regulatory Affairs

Enclosures
cc: See page 2

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FEB 28 1991

U.S. Nuclear Regulatory Commission**cc (Enclosures):**

**Ms. S. C. Black, Deputy Director
Project Directorate II-4
U.S. Nuclear Regulatory Commission
One White Flint, North
11555 Rockville Pike
Rockville, Maryland 20852**

**Mr. B. A. Wilson, Project Chief
U.S. Nuclear Regulatory Commission
Region II
101 Marietta Street, NW, Suite 2900
Atlanta, Georgia 30323**

**Mr. Jack M. Donohew
U.S. Nuclear Regulatory Commission
One White Flint, North
11555 Rockville Pike
Rockville, Maryland 20852**

**NRC Resident Inspector
Sequoyah Nuclear Plant
2600 Igou Ferry Road
Soddy Daisy, Tennessee 37379**

**Mr. Peter S. Tam
U.S. Nuclear Regulatory Commission
One White Flint, North
11555 Rockville Pike
Rockville, Maryland 20852**

**NRC Resident Inspector
Watts Bar Nuclear Plant
P.O. Box 700
Spring City, Tennessee 37381**

**Mr. Thierry M. Ross
U.S. Nuclear Regulatory Commission
One White Flint, North
11555 Rockville Pike
Rockville, Maryland 20852**

**NRC Resident Inspector
Browns Ferry Nuclear Plant
Route 12, P.O. Box 637
Athens, Alabama 35609-2000**

**TENNESSEE VALLEY AUTHORITY (TVA)
FITNESS-FOR-DUTY (FFD) PERFORMANCE DATA
JULY 1, 1990 THROUGH DECEMBER 31, 1990**

SUMMARY

TVA respectfully submits the following enclosures as the FFD Performance Data for the period ending December 31, 1990. Below is information that TVA feels the Commission will find of value in reviewing 10 CFR Part 26.

TRENDS

- During this reporting period, TVA experienced an increased number of pre-employment positive test results from the Sequoyah Nuclear Plant (SQN). This increase is attributed to the increase of hourly craftsmen and contractors to support the refueling outage of SQN.
- Prior to 10 CFR Part 26, TVA Nuclear Power (NP) had in place a Fitness for Duty (FFD) Program including random testing starting in October 1987. The random testing rate was 48 percent of the population annually. During the timeframe of October 13, 1987 through December 31, 1990, the rate of random positives for TVA NP was .7 percent. TVA implemented 10 CFR Part 26 on December 11, 1989. Since the 100-percent annual testing rate required by 10 CFR Part 26 began, the random positive test rate has dropped to .3 percent for TVA NP overall. Even though TVA tests employees beyond the scope of the rule, it is believed that the 100-percent annual test rate may be too high, and not cost effective for the low rate of random positives.
- Overall, there were no significant trends identified and TVA is pleased with the performance of the program.

MANAGEMENT INITIATIVES

- A FFD Task Force has been established which includes members from Human Resources, Health Services, Security, Licensing, and the Office of the General Counsel. This task force periodically reviews the program and procedures to identify enhancements or improvements to the program.
- Currently, TVA is reviewing its FFD procedure to enhance the effectiveness of the program.
- For FFD training which would expire on December 31, 1990, TVA NP adopted the policy of placing persons in nonwork status who did not complete the required FFD training. They remained in nonwork status until the required training was completed. This action was done in addition to removing unescorted access clearance or emergency response duties, if applicable. This policy proved very effective in that only three employees were placed in nonwork status and 13 contractors were not allowed on site until the required training was completed.

Tennessee Valley Authority (TVA)
Fitness for Duty Performance Data
July 1, 1990 - December 31, 1990

MANAGEMENT INITIATIVES (continued)

- During training classes, employees and contractors are provided a FFD Question and Answer form which allows them to submit questions directly to the FFD Program Manager.
- TVA gives a written test at the completion of FFD training to ensure that the program is comprehended.
- For individuals selected for random two times within a twelve-month period of time, and unavailable both times, the person must be tested as soon as he/she returns to work.

GENERAL INFORMATION

- TVA would like to make the NRC aware of a Merit Systems Protection Board (MSPB) appeal filed against the Agency by an individual who refused to submit to the random drug testing program during the reporting period ending June 30, 1990. This individual was an engineer in the Knoxville, Tennessee, Nuclear Engineering organization. He did not have unescorted access or emergency response duties; therefore, he was not under the scope of 10 CFR Part 26, but was included in TVA's NP FFD Program. The employee was terminated for refusing to submit to the drug test. His appeal was based on his belief that he should not be included in the random testing program. The employee's termination was upheld at the initial decision level during this reporting period, based on the administrative judge's conclusion that the employee's inclusion in the random drug testing pool was reasonable. The appellant has appealed the initial decision to the full MSPB. A copy of the initial decision is enclosed for information purposes.

FITNESS FOR DUTY PROGRAM

Performance Data Personnel Subject to 10CFR 26

Tennessee Valley Authority
 COMPANY
 Browns Ferry Nuclear Plant
 LOCATION
 Pamela C. Hamilton, FFD Coordinator
 CONTACT NAME

December 31, 1990
 6 MONTHS ENDING
 (615) 751-5024
 PHONE (INCLUDE AREA CODE)

CUTOFFS: SCREEN/CONFIRMATION (ng/ml) APPENDIX A TO 10CFR 26

MARIJUANA / AMPHETAMINES / _____ /
 COCAINE / PHENCYCLIDINE / _____ /
 OPIATES / ALCOHOL (% BAC) / _____ /

TESTING RESULTS	LICENSEE EMPLOYEES				LONG-TERM CONTRACTOR PERSONNEL		SHORT-TERM CONTRACTOR PERSONNEL	
	# TESTED	# POSITIVE	# REFERRED TO EAP	# ACCESS RESTORED	# TESTED	# POSITIVE	# TESTED	# POSITIVE
AVERAGE NUMBER WITH UNESCORTED ACCESS	3238						348	
PRE-EMPLOYMENT	523	3					410	0
PRE-BADGING	60	0					10	0
PERIODIC	N/A	N/A					N/A	N/A
FOR CAUSE	4	0					1	0
POST ACCIDENT	0	0					0	0
RANDOM	1962	6					268	1
FOLLOW-UP	35	0					N/A	N/A
* OTHER	4	0					N/A	N/A
TOTAL	2588	9					689	1

* Includes transfers to Nuclear Power from other TVA organizations.

RANDOM TESTING PROGRAM RESULTS

INDIVIDUALS TESTED	1989		1990		1991		1992		1993	
# POSITIVE		4	9	7						
# TESTED		1256	2158	2230						
% POSITIVE		.32	.42	.31						
GRAPH OF % POSITIVE	5									
	4									
	3									
	2									
	1									

CONFIRMED POSITIVE TESTS FOR SPECIFIC SUBSTANCES

MARIJUANA			9	2						
COCAINE			5	6						
OPIATES			2	0						
AMPHETAMINES			0	0						
PHENCYCLIDINE			0	0						
ALCOHOL			3	2						

ENCLOSURE 1

SUMMARY OF MANAGEMENT ACTIONS FOR
BROWNS FERRY NUCLEAR PLANT

Three prospective licensee employees tested positive during this reporting period in the pre-employment category. These individuals were not hired by TVA and will not be considered for employment in TVA's Nuclear Power (NP) organization within the next three years.

In the random testing category, six licensee employees and one contractor employee tested positive. Two of the TVA employees were removed from their work activities and referred to the Employee Assistance Program (EAP). Neither returned to work during this reporting period. Two employees (hourly employees, were terminated from TVA employment and informed that EAP would be available for information concerning sources of counseling and/or treatment available in the community. One employee was terminated in accordance with the NP Fitness for Duty Program procedure which calls for termination of Nuclear Security Officers, Security Shift Supervisors, and other Nuclear Security Managers in the event of positive drug tests (except in the case of self-referral to EAP.) One hourly employee, who tested positive, was selected for random testing the day his employment was being terminated due to the expiration of a temporary appointment. This employees security record has been updated to indicate a 10 CFR Part 26 violation. One contractor employee tested positive and was removed from TVA property and returned to the contractor.

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FITNESS FOR DUTY PROGRAM**Performance Data
Personnel Subject to 10CFR 26**

Tennessee Valley Authority

COMPANY

December 31, 1990

6 MONTHS ENDING

Sequoyah Nuclear Plant

LOCATION

Pamela C. Hamilton, FFD Coordinator

CONTACT NAME

(615) 751-5024

PHONE (INCLUDE AREA CODE)

CUTOFFS: SCREEN/CONFIRMATION (ng/ml) APPENDIX A TO 10CFR 26

MARIJUANA	/	AMPHETAMINES	/	_____	/
COCAINE	/	PHENCYCLIDINE	/	_____	/
OPIATES	/	ALCOHOL (% BAC)	/	_____	/

TESTING RESULTS	LICENSEE EMPLOYEES				LONG-TERM CONTRACTOR PERSONNEL		SHORT-TERM CONTRACTOR PERSONNEL	
	# TESTED	# POSITIVE	# REFERRED TO EAP	# ACCESS RESTORED	# TESTED	# POSITIVE	# TESTED	# POSITIVE
AVERAGE NUMBER WITH UNESCORTED ACCESS	2172						207	
PRE-EMPLOYMENT	1122	22					5	0
PRE-BADGING	134	0					488	3
PERIODIC	N/A	N/A					N/A	N/A
FOR CAUSE	6	2					0	0
POST ACCIDENT	0	0					0	0
RANDOM	1626	4					134	2
FOLLOW-UP	36	1					N/A	N/A
*OTHER	2	0					N/A	N/A
TOTAL	2926	29					627	5

* Includes transfers to Nuclear Power from other TVA organizations.

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RANDOM TESTING PROGRAM RESULTS

INDIVIDUALS TESTED	1989		1990		1991		1992		1993		
# POSITIVE	2		7	6							
# TESTED	704		1616	1760							
% POSITIVE	.28		.43	.34							
GRAPH OF % POSITIVE	5										
	4										
	3										
	2										
	1										

CONFIRMED POSITIVE TESTS FOR SPECIFIC SUBSTANCES

MARIJUANA			22	20						
COCAINE			7	10						
OPIATES			2	0						
AMPHETAMINES			0	0						
PHENCYCLIDINE			0	0						
ALCOHOL			2	4						

ENCLOSURE 2

SUMMARY OF MANAGEMENT ACTIONS FOR
SEQUOYAH NUCLEAR PLANT

Twenty-two prospective licensee employees tested positive during this reporting period in the pre-employment category. Sequoyah experienced outage hiring from July 1, 1990 through September 30, 1990, which explains the high number of pre-employment positives in relation to TVA's other nuclear plant sites. These individuals were not hired by TVA and will not be considered for employment in TVA's Nuclear Power organization within the next three years.

In the pre-badging category, three contract employees tested positive. These employees were not badged for unescorted access and returned to the contract company.

There were three licensee employees who tested positive in the random-testing category and one for-cause termination of employment for refusing to submit to the random testing program. Two of the employees (hourly employees) were terminated from TVA employment and informed that Employee Assistance Program (EAP) would be available for information concerning sources of counseling and/or treatment in the community. The third employee was removed from work activities and referred to the EAP. This employee was returned to work 47 days following the confirmed positive and is in the follow-up program. Two contract employees tested positive and were removed from TVA property and returned to the contractor.

One employee who tested positive during the reporting period ending June 30, 1990, tested positive in the follow-up testing program. This employee's TVA employment was terminated.

Two licensee employees tested positive in the for-cause category and both had their TVA employment terminated.

FITNESS FOR DUTY PROGRAM

Performance Data Personnel Subject to 10CFR 26

Tennessee Valley Authority

December 31, 1990

COMPANY

6 MONTHS ENDING

Watts Bar Nuclear Plant

LOCATION

Pamela C. Hamilton, FFD Coordinator

(615) 751-5024

CONTACT NAME

PHONE (INCLUDE AREA CODE)

CUTOFFS: SCREEN/CONFIRMATION (ng/ml) APPENDIX A TO 10CFR 26

MARIJUANA / AMPHETAMINES / _____ /
 COCAINE / PHENCYCLIDINE / _____ /
 OPIATES / ALCOHOL (% BAC) / _____ /

TESTING RESULTS	LICENSEE EMPLOYEES				LONG-TERM CONTRACTOR PERSONNEL		SHORT-TERM CONTRACTOR PERSONNEL	
	# TESTED	# POSITIVE	# REFERRED TO EAP	# ACCESS RESTORED	# TESTED	# POSITIVE	# TESTED	# POSITIVE
AVERAGE NUMBER WITH UNESCORTED ACCESS	N/A*						N/A	
PRE-EMPLOYMENT	1647	7					223	4
PRE-BADGING	N/A	N/A					N/A	N/A
PERIODIC	N/A	N/A					N/A	A
FOR CAUSE	1	0					1	1
POST ACCIDENT	0	0					0	0
RANDOM	1879	4					395	2
FOLLOW-UP	20	1					N/A	N/A
** OTHER	12	0					N/A	N/A
TOTAL	3559	12					583	7

* This is a construction site at which unescorted access has not been established.

** Includes transfers to Nuclear Power from other TVA organizations.

RANDOM TESTING PROGRAM RESULTS

INDIVIDUALS TESTED	1989		1990		1991		1992		1993	
# POSITIVE		5	3	6						
# TESTED		987	1732	2274						
% POSITIVE		.51	.17	.26						
GRAPH OF % POSITIVE	5									
	4									
	3									
	2									
	1									

CONFIRMED POSITIVE TESTS FOR SPECIFIC SUBSTANCES

MARIJUANA			10	9						
COCAINE			3	5						
OPIATES			1	2						
AMPHETAMINES			0	1						
PHENCYCLIDINE			0	0						
ALCOHOL			1	2						

ENCLOSURE 3

SUMMARY OF MANAGEMENT ACTIONS FOR
WATTS BAR NUCLEAR PLANT

There were seven prospective licensee employees and four contract personnel who tested positive in the pre-employment category during this reporting period. These individuals were not hired by TVA and will not be considered for employment in TVA's Nuclear Power organization within the next three years.

In the random testing category, four licensee employees and two contract employees tested positive. Three hourly employees were terminated from TVA employment and informed that the Employee Assistance Program (EAP) would be available for information concerning sources of counseling and/or treatment available in the community. One employee was removed from work and referred to EAP. This employee was returned to work twenty-four days after confirmation of the positive test result and placed in the follow-up testing program. Two contract employees tested positive and were removed from TVA property and returned to the contractor.

An employee who tested positive during the reporting period ending June 30, 1990, tested positive in the follow-up testing program. This employee's TVA employment was terminated.

The only for-cause positive during this reporting period was one contract employee who was removed from TVA property and returned to the contractor.

FITNESS FOR DUTY PROGRAM**Performance Data
Personnel Subject to 10CFR 26**

Tennessee Valley Authority

COMPANY

Bellefonte Nuclear Plant

LOCATION

Pamela C. Hamilton, FFD Coordinator

CONTACT NAME

December 31, 1990

6 MONTHS ENDING

(615) 751-5024

PHONE (INCLUDE AREA CODE)

CUTOFFS: SCREEN/CONFIRMATION (ng/ml) APPENDIX A TO 10CFR 26

MARIJUANA	/	AMPHETAMINES	/	_____	/
COCAINE	/	PHENCYCLIDINE	/	_____	/
OPIATES	/	ALCOHOL (% BAC)	/	_____	/

TESTING RESULTS	LICENSEE EMPLOYEES				LONG-TERM CONTRACTOR PERSONNEL		SHORT-TERM CONTRACTOR PERSONNEL	
	# TESTED	# POSITIVE	# REFERRED TO EAP	# ACCESS RESTORED	# TESTED	# POSITIVE	# TESTED	# POSITIVE
AVERAGE NUMBER WITH UNESCORTED ACCESS	N/A*						N/A	
PRE-EMPLOYMENT	37	0					67	0
PRE-BADGING	N/A	N/A					N/A	N/A
PERIODIC	N/A	N/A					N/A	N/A
FOR CAUSE	0	0					0	0
POST ACCIDENT	0	0					0	0
RANDOM	97	0					5	0
FOLLOW-UP	0	0					N/A	N/A
** OTHER	4	0					N/A	N/A
TOTAL	138	0					72	0

* This is a construction site at which unescorted access has not been established.

** Includes transfers to Nuclear Power from other TVA organizations.

7/21/89

RANDOM TESTING PROGRAM RESULTS

INDIVIDUALS TESTED	1989		1990		1991		1992		1993	
# POSITIVE		0	0	0						
# TESTED		51	91	102						
% POSITIVE		0	0	0						
GRAPH OF % POSITIVE	5									
	4									
	3									
	2									
	1									

CONFIRMED POSITIVE TESTS FOR SPECIFIC SUBSTANCES

MARIJUANA			0	0						
COCAINE			0	0						
OPIATES			0	0						
AMPHETAMINES			0	0						
PHENCYCLIDINE			0	0						
ALCOHOL			0	0						

ENCLOSURE 4

SUMMARY OF MANAGMENT ACTIONS FOR
BELLEFONTE NUCLEAR PLANT

There were no positive drug or alcohol tests, or any other fitness for duty events at Bellefonte Nuclear Plant during this reporting period.

FITNESS FOR DUTY PROGRAM

Performance Data Personnel Subject to 10CFR 26

Tennessee Valley Authority

December 31, 1990

COMPANY

6 MONTHS ENDING

Corporate (Chattanooga, Knoxville, Other)

LOCATION

Pamela C. Hamilton, FFD Coordinator

(615) 751-5024

CONTACT NAME

PHONE (INCLUDE AREA CODE)

CUTOFFS: SCREEN/CONFIRMATION (ng/ml) APPENDIX A TO 10CFR 26

MARIJUANA	/	AMPHETAMINES	/	_____	/
COCAINE	/	PHENCYCLIDINE	/	_____	/
OPIATES	/	ALCOHOL (% BAC)	/	_____	/

TESTING RESULTS	LICENSEE EMPLOYEES				LONG-TERM CONTRACTOR PERSONNEL		SHORT-TERM CONTRACTOR PERSONNEL	
	# TESTED	# POSITIVE	# REFERRED TO EAP	# ACCESS RESTORED	# TESTED	# POSITIVE	# TESTED	# POSITIVE
AVERAGE NUMBER WITH UNESCORTED ACCESS	*N/A						N/A	
PRE-EMPLOYMENT	20	4					161	2
PRE-BADGING	N/A	N/A					N/A	N/A
PERIODIC	N/A	N/A					N/A	N/A
FOR CAUSE	1	0					0	0
POST ACCIDENT	0	0					0	0
RANDOM	209	0					14	0
FOLLOWUP	2	0					N/A	N/A
** OTHER	6	0					N/A	N/A
TOTAL		4					175	2

* Persons assigned to the corporate organization but with unescorted access at a TVA nuclear plant site are included in the averages for the site or sites where they hold the unescorted access authorization. 7/21/89

RANDOM TESTING PROGRAM RESULTS

INDIVIDUALS TESTED	1989	1990	1991	1992	1993
# POSITIVE	2	2	0		
# TESTED	261	450	223		
% POSITIVE	.77	.44	0		

GRAPH OF % POSITIVE	5										
	4										
	3										
	2										
	1										

CONFIRMED POSITIVE TESTS FOR SPECIFIC SUBSTANCES

	1989	1990	1991	1992	1993
MARIJUANA		0	2		
COCAINE		0	3		
OPIATES		0	0		
AMPHETAMINES		0	0		
PHENCYCLIDINE		0	0		
ALCOHOL		0	1		

ENCLOSURE 5

SUMMARY OF MANAGEMENT ACTIONS FOR
CORPORATE NUCLEAR POWER OFFICES

There were four prospective licensee employees and two contractor personnel who tested positive in the pre-employment category during this reporting period. These individuals were not hired by TVA and will not be considered for employment in TVA's Nuclear Power (NP) organization for the next three years.

There were no other positive test results within the Corporate Offices.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ST. LOUIS REGIONAL OFFICE

901107D004

210.15-1

Appellant,

v.

TENNESSEE VALLEY AUTHORITY,
Agency.

DOCKET NUMBER
SL07529010318

DATE: November 5, 1990

_____, Clinton, Tennessee, pro se.

Edward R. Patrick, Esquire, Knoxville, Tennessee, for the
agency.

BEFORE

Jack E. Salyer
Administrative Judge

INITIAL DECISION

The appellant timely appealed his removal from the position of Mechanical Engineer, Mechanical Engineering Department, Division of Nuclear Engineering, Office of Nuclear Power, Knoxville, Tennessee, effective June 29, 1990. The appellant has appeal rights to the Merit Systems Protection Board (Board) under 5 U.S.C. §§ 7511(a)(1)(B), 7512(1), 7513(d), and 7701(a).

For the reasons outlined below, I AFFIRM the appellant's removal.

ANALYSTS AND FINDINGS

The agency proposed and effected the appellant's removal based on his failure to report to the agency's Medical Services office and present a urine specimen under the random drug testing

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program of the agency's Office of Nuclear Power. Appeal File, Tabs 3(4d) and (4b).¹

The agency's charge that the appellant failed to report to the Medical Services office and present a urine specimen in accordance with the random drug testing requirements of the Office of Nuclear Power is supported by a preponderance of the evidence.

The following facts are undisputed. In his Mechanical Engineer position, the appellant worked as a technical supervisor on mechanical systems for the agency's nuclear plants. The appellant also possessed a security clearance permitting him unescorted access to those plants. Under its regulations, the Nuclear Regulatory Commission (NRC) requires nuclear plant licensees, including the agency, to test their employees randomly for illegal drugs. Based on the NRC requirements, the Office of Nuclear Power has a Fitness for Duty Program (FFDP) which includes, inter alia, mandatory random drug testing. The FFDP further provides that employees who fail to provide urine specimens will be terminated for cause. The appellant was aware that his employment in the Office of Nuclear Power involved the possibility that under the FFDP, he would be required at some point, after random selection, to provide a urine specimen, and that he would be terminated if he failed to do so.

On May 24, 1990, in accordance with the established selection policy under the random testing program,² the appellant was issued a Tennessee Valley Authority (TVA) Form 1444 (Request for Medical Evaluation) which directed him to report to the agency's Medical Services office for random drug/alcohol

¹ Because the appellant did not request a hearing, this decision is based on the parties' written submissions.

² The appellant does not challenge the actual randomness of his selection to provide a urine specimen under the FFDP.

screening.³ The appellant immediately advised Arnold B. Dugger, Human Resource Officer, that he would not report to the Medical Services office for testing. Dugger then informed the appellant that if he did not report and provide a urine specimen, he would be terminated in accordance with the FFDP. The appellant informed Dugger that while he was aware of the consequences of his failure to provide a urine specimen, he would still not do so. In subsequent discussions on the same day with other agency managers, the appellant was again advised of the consequences of his refusal to provide a urine specimen, but continued to decline to do so. See generally Appeal File.

The appellant claims that the agency's random drug testing program results in unconstitutional searches because it has no requirement for individualized suspicion. I note at the outset that the Board has held that while it is without authority to determine the constitutionality of Federal statutes, it does have the authority to adjudicate a constitutional challenge to an agency's application of a statute. I find that, by analogy, the foregoing principle can certainly be extended to an agency regulation or policy. See *Bayly v. Office of Personnel Management*, 42 M.S.P.R. 524, 526 (1990); *Brown v. Department of Transportation*, 15 M.S.P.R. 617, 622 (1983).

For the following reasons, I find that the appellant's claim that the agency's random drug testing program violates the Fourth Amendment to the United States Constitution is without merit.⁴ While recent decisions of the United States Supreme Court have

³ The scheduled testing was not based on any "individualized suspicion" that the appellant was personally involved in any way with illegal drugs. Moreover, the removal action under appeal was not based on illegal drug involvement by the appellant.

⁴ Although he is challenging the constitutionality of the agency's random drug testing program, as noted, *supra*, the appellant does not contest the actual random nature of his selection for drug testing under the agency's program. In addition, he does not contend that, for any improper reason, he was singled out for drug testing. Finally, he does not contend that the drug screening procedures of the FFDP are unreliable. See generally Appeal File.

established that drug tests constitute Fourth Amendment searches, they have also concluded that individualized suspicion, i.e., a belief that a particular employee has a drug problem, is not a prerequisite to testing in all cases. Rather, the decisions have held that in each case, a balancing test must be employed to determine the constitutionality of the search. See *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 109 S.Ct. 1402, 1418, 103 L.Ed.2d 639 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 1390, 103 L.Ed.2d 685 (1989).

In *Von Raab*, the Court upheld a United States Customs Service requirement that employees seeking transfers or promotions to certain positions undergo drug testing. In *Skinner*, the Court upheld a Federal Aviation Administration program requiring railroads to administer drug tests to certain employees involved in major railroad accidents or who violated certain safety rules.⁵ In both cases, the Court held that the normal Fourth Amendment requirements of a warrant and probable cause do not necessarily apply in the drug testing context. *Id.* Thus, when a search serves

special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

Von Raab, 109 S.Ct. at 1390.

Here, I find that the agency's drug testing program clearly serves a requisite "special governmental need" as described in *Von Raab*. I find that the special need here is obviously the compelling importance of a drug-free nuclear workplace to public health and safety, e.g, the prevention of nuclear catastrophes such as that at Chernobyl and even near-disasters such as that at

⁵Although neither case involved the random drug testing present here, I find that the principles set out in the decisions are otherwise applicable to the facts of the instant case.

Three Mile Island. In this vein, I note that in its decision in *Skinner*, 109 S.Ct. at 1419, the Court specifically referred to the significant potential dangers posed to public health and safety by nuclear plants.

In *Skinner*, 109 S.Ct. at 1418, with regard to the question of the intrusion on personal privacy inherent in drug testing, the Court further held that:

More importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.

I find that the nuclear power industry is just such a heavily regulated industry -- indeed, it is the regulatory province of a dedicated Federal agency, the NRC. I therefore find that the circumstances of the nuclear power industry, which involve the horrific possibility of nuclear catastrophe, justify the intrusion on personal employee privacy inherent in random drug testing. As the Court stated in *Von Raab*,

Our precedents have settled that, in certain limited circumstances, the Government's need to discover such latent or hidden [hazardous] conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.

Von Raab, 109 S.Ct. at 1392. The court additionally found:

Where, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.

Von Raab, 109 S.Ct. at 1395.

Accordingly, in view of the importance of safety in the nuclear power industry and the potential consequences of nuclear

disaster, I find that the minimal intrusion⁶ on the appellant's privacy of the FFDP was clearly appropriate and consistent with the emerging case law. I find that the safety interests of the Government here clearly outweigh the appellant's expectations of personal privacy.⁷ See also *Bluestein v. Skinner*, 908 F.2d 451, 453 (9th Cir. 1990), in which the court held that random drug testing of airline personnel having safety responsibilities did not violate the Fourth Amendment. The court expressly held that the Government's special interest in securing safe airline travel for the public overcame the violation of the privacy of the tested employees. *Id.*

Therefore, I find that under all the circumstances present in the case, i.e., the nature of the nuclear power industry, the criticality of the public health and safety concerns with regard to that industry, and the nature of the appellant's engineering position, random drug testing constitutes a reasonable job requirement of his position. I also note again that the appellant had been fully aware for several years that at any moment he could be required to submit a urine specimen and that he would be terminated if he did not do so. Accordingly, I find that the agency's charge is supported by a preponderance of the evidence, and it is sustained. 5 U.S.C. § 7701(c)(1)(B).

The appellant's removal promotes the efficiency of the service and is an appropriate penalty under all the facts and circumstances.

As found, *supra*, the agency has a legitimate governmental interest in monitoring potential drug abuse within its Office of

⁶ While the agency's random drug testing program has been in place for several years, the scheduled 1990 drug test of the appellant would have been the first to which he would have been subjected.

⁷ Because of the foregoing finding, I further find that the appellant's additional claim, that random drug testing is unnecessary because of other safeguards built into both the agency's overall drug policy and program and his work procedures, is irrelevant.

Nuclear Power. I find that the appellant's failure to submit a urine specimen under the FFDP, if not disciplined, would certainly have a damaging impact on the agency's ability to operate such program. Few employees would voluntarily provide urine specimens if they were aware that they could not successfully be disciplined for failing to do so. Therefore, I find that taking disciplinary action against the appellant was for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a).

The remaining issue for analysis is the appropriateness of the penalty of removal. In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), the Board held that it would review an imposed penalty to insure that the agency conscientiously considered the relevant factors in choosing the penalty and struck a responsible balance within tolerable limits of reasonableness. The Board will not disturb an agency's action and will accord deference to it if it is the maximum reasonable penalty which may be imposed after consideration of all the relevant factors. See *Capito v. Veterans Administration*, 39 M.S.P.R. 289, 292 (1988), *aff'd*, 899 F.2d 1089 (Fed. Cir. 1989) (Table); *Davis v. Department of the Treasury*, 8 M.S.P.R. 317, 320-21 (1981).

The appellant's failure to provide a urine specimen under the agency's program requirements was deliberate and repeated. In the face of both explicit regulatory guidance and repeated supervisory admonitions to the effect that he would be removed if he did not provide a urine specimen, the appellant expressly failed to do so. A deliberate failure to follow a known agency regulation is a serious offense, the occurrence of which may justify removal. See, e.g., *Yates v. Manale*, 377 F.2d 888 (5th Cir. 1967), *cert denied*, 390 U.S. 943, 88 S.Ct. 1037, 19 L.Ed.2d 1139 (1968). In this case, the regulation which the appellant failed to follow was designed to further the maintenance of a drug-free nuclear workplace, an integral part of the United States Government's current anti-drug policy. Thus, I find that

the appellant's refusal to cooperate in the FFDP random drug testing was not an inconsequential matter.

In addition, I find that the appellant was not without informed choices here -- he could alternatively have chosen to: (1) provide a urine specimen and then grieve or otherwise complain about the matter or (2) not provide a urine specimen and accept the inevitable consequences of his failure. I find that in choosing the second alternative, the appellant voluntarily placed himself in employment jeopardy, a position from which, at several points prior to his removal, he could easily have backed away. The appellant did not do so, instead steadfastly refusing to provide the required urine specimen.

Moreover, the appellant set himself up as the arbiter of the legality of the agency's drug testing program, a function which in our system of laws, is clearly reserved for courts and other competent legal authorities. This is not a situation where a court, or any forum for that matter, has expressly found the agency's random drug testing requirements to be unconstitutional or otherwise invalid. See *Gragg v. Department of the Air Force*, 24 M.S.P.R. 506, 509 (1984) ("*Gragg II*"). In such circumstances, clearly not present here, an employee may not be disciplined for failing to follow an improper or invalid program requirement in order to hold his or her position. Here, while the constitutionality of the agency's random drug testing program has been challenged, it has not been determined by any court or competent legal authority to be invalid.

I also find that governmental organizations cannot easily function if individual employees are free to decide for themselves whether they will comply with program requirements of their positions. As previously noted, without the express sanction of termination for a failure to provide a urine specimen, few employees would voluntarily do so. In this vein, I also find that although it is unfortunate that the appellant had to be removed, his removal will certainly act as a deterrent to other employees who might be contemplating similar actions.

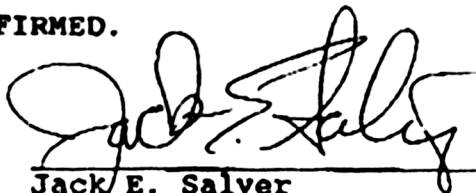
Finally, I find that the appellant has shown no indication whatsoever of rehabilitation. Throughout the appellate proceeding, the appellant has steadfastly maintained that under no circumstances would he ever submit to random drug testing. See generally Appeal File. Thus, I find that a penalty short of removal would be a futile exercise -- even if reinstated, the appellant would continue to fail to provide required urine specimens. See *Haymore v. Department of the Navy*, 9 M.S.P.R. 499, 505 (1982).

In contrast to the aggravating factors discussed, *supra*, I find that the mitigating factors here are the appellant's nearly 23 years of service with the agency, his undisputed satisfactory or better service during that period, the lack of any prior disciplinary actions, and, especially, the undisputed sincere and principled nature of the appellant's moral stand. Nevertheless, I find that it was the appellant's free and unfettered decision to not provide a urine specimen in circumstances where he was fully aware that it would undoubtedly cost him his job which resulted in his removal. While I find that the appellant's moral position as to the constitutionality of random drug testing is certainly worthy of sympathy and even respect, it simply does not constitute a factor warranting mitigation of the agency's penalty.

Therefore, I find that the mitigating factors are overwhelmed by the aggravating factors described, *supra*, and that the agency has demonstrated that the penalty which was accorded the appellant was not inappropriate under all the facts and circumstances involved. See *Delessio v. United States Postal Service*, 33 M.S.P.R. 517, 521, *aff'd*, 837 F.2d 1096 (Fed. Cir. 1987) (Table); see *Currie*, 21 M.S.P.R. at 726-27.

DECISION

The agency's action is **AFFIRMED**.



Jack E. Salyer
Administrative Judge

FOR THE BOARD:

NOTICE TO THE APPELLANT

This initial decision will become final on December 10, 1990, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant

Route 1, Box 231
Clinton, TN 37716

Agency's Representative

Mr. Edward R. Patrick
Senior Attorney
Office of the General Counsel
Tennessee Valley Authority
400 West Summit Hill Drive, ET 11D 63H-K
Knoxville, TN 37902-1499

Other

Ms. Marjorie Marks
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, NW., Room 7412
Washington, DC 20415

November 5, 1990
(date)


Deloris Strawbridge
Legal Technician