



Tennessee Valley Authority 1101 Market Street Chattanooga Tennessee 37402

**AUG 29 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: JANUARY - JUNE 1991**

In accordance with 10 CFR 26.71(d), enclosed is TVA's FFD Program Performance Data for the six-month period of January 1 through June 30, 1991. Enclosure 1 contains the trends and management objectives for TVA's FFD program. Enclosures 2 through 5 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 6. Enclosure 7 is a summary of FFD events reported to the NRC pursuant to 10 CFR 26.73 during this six-month period. Enclosure 8 consists of two decisions of the U.S. Merit Systems Protection Board (MSPB) upholding the termination of an engineer in TVA's Knoxville Nuclear Power office who refused a random drug and alcohol test. The initial decision of the MSPB St. Louis Regional Office found that the agency's drug testing program served a "special governmental interest" under United States Supreme Court precedents and that the employee's refusal to take the test warranted his termination. The employee appealed the initial decision, but the full MSPB in Washington denied his appeal without opinion.

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PDR ADDCK 05000259  
R FDR

*Feb 11*

U.S. Nuclear Regulatory Commission

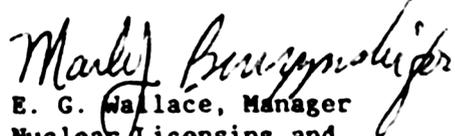
**AUG 29 1991**

The rate of drug and alcohol testing used by TVA is designed at an annual rate equal to 100 percent of the work force subject to random testing.

If you have any questions concerning this information, please telephone Steve D. Gilley at (615) 751-7667.

Very truly yours,

TENNESSEE VALLEY AUTHORITY

  
E. G. Wallace, Manager  
Nuclear Licensing and  
Regulatory Affairs

Enclosures

cc: See page 3

U.S. Nuclear Regulatory Commission

**AUG 29 1991**

cc (Enclosures):

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

Mr. D. E. LaBarge, Project Manager  
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, Senior Project Manager  
U.S. Nuclear Regulatory Commission  
One White Flint, North  
11555 Rockville Pike  
Rockville, Maryland 20852

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

Mr. Thierry M. Ross, Project Manager  
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

Mr. M. C. Thadani, Project Manager  
U.S. Nuclear Regulatory Commission  
One White Flint, North  
11555 Rockville Pike  
Rockville, Maryland 20852

## Enclosure 1

### TENNESSEE VALLEY AUTHORITY (TVA) FITNESS FOR DUTY (FFD) PERFORMANCE DATA JANUARY 1, 1991 through JUNE 30, 1991

#### TRENDS AND MANAGEMENT INITIATIVES

##### TRENDS

The confirmed positive test rate for all categories (pre-employment, pre badging, for cause, post-accident, random and followup) for this reporting period was 0.3 percent (26 positive tests) for all testing categories. The rate of random positives was 0.2 percent (14 positive tests), which represents a 0.1 percent decrease since the last reporting period.

- There were no adverse significant trends identified during the reporting period.

##### MANAGEMENT INITIATIVES

- The FFD procedure was revised effective July 5, 1991, and includes the following:
  - For persons who have a blood alcohol content of .02 to .039, the Medical Review Officer will refer the person to the Employee Assistance Program (EAP). The supervisor will be notified to determine whether the person should be allowed to return to duty that day or shift.
  - The department manager is responsible for determining if a review of work is needed for persons with confirmed positive test results.
- A procedure has been developed for handling drugs and suspected contraband found on nuclear plant sites. This procedure gives instructions for chain of custody of the substance and sending the substance to the contract laboratory for analysis.
- As stated in TVA's response to a Notice of Violation dated July 11, 1991, the FFD Coordinator makes unannounced quarterly visits to all collection facilities for the purpose of ensuring that drug and alcohol testing is properly performed.
- Physical modifications are currently being made to the Browns Ferry Health Station collection facility to decrease the likelihood of human error in the collection process.
- On June 7, 1991, a day-long refresher "Train the Trainers" course was held for FFD training instructors. Members of the FFD Task Force met with the trainers to update them in the areas of the FFD procedure revision, annual audit, NRC inspection, security, EAP, and medical procedures. In addition, a nationally-certified substance abuse counselor from the community spoke with the trainers regarding the drugs of choice in the 1990s.
- The TVA EAP has developed an EAP Marketing Plan for 1992. The plan includes:
  - Sending EAP brochures to each TVA employee.
  - Feature articles in the Inside TVA newspaper.
  - Setting up a mobile display booth with literature on EAP services in high traffic areas of each site.
  - Brown bag lunch meetings with representatives from the EAP.

## Enclosure 2

**SUMMARY OF MANAGEMENT ACTIONS FOR  
BROWNS FERRY NUCLEAR PLANT**

Two 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 pre-badging category, one TVA employee, non-nuclear, tested positive. This employee was referred to the EAP by management in the employee's organization. The employee was returned to his organization and will not be granted access to TVA nuclear plant sites.

In the random testing category, three licensee employees and two contractor employees tested positive. In addition, one licensee employee refused the random test and was terminated in accordance with TVA's Fitness For Duty (FFD) policy. The three licensee employees who tested positive were removed from their work activities and referred to the Employee Assistance Program (EAP). One of these licensee employees returned to work 37 calendar days after the Medical Review Officer confirmed the positive test result and is currently in the follow-up testing program. The second employee's position was eliminated through a reduction in force (RIF) before the employee was able to return to work. The third licensee employee did not return to work during this reporting period. The two contractor employees who tested positive were removed from TVA property and returned to the contractor.

During this reporting period, suspect contraband was found on two occasions, February 22, 1991, and March 16, 1991. The suspect substances were found in the coffee in two different offices, the Work Control Unit and the Radiological Control Unit, respectively. Both offices were in the protected area. Management was unaware of the suspect contraband until the toxicology results were reported on April 26, 1991, verifying the substance as marijuana. The NRC Operations Center was notified of the substance found onsite April 26, 1991, per the requirements of 10 CFR 26.73. A follow up report was provided to NRC on May 9, 1991. The TVA Inspector General was called in to investigate, but was unable to determine how the marijuana was brought onsite or what person or persons were responsible.

As a consequence of the contraband discovery, testing of employees in the Radiological Control and Work Control Units was performed. In the Radiological Control Unit, 163 tests were performed. Of these, two employees tested positive, one was removed from work activities and referred to the EAP. The other employee was tested as part of the 163 work unit tests and was also selected for a random test a few days later. The results for both tests came in on the same day and indicated a positive result on the work unit test and a need for retest on the random test, as a result of a low creatinine level. The employee refused the retest and his employment was terminated in accordance with TVA's FFD policy. In the Work Control Unit, 56 employees were tested. There were no positive results. In addition to the work unit testing, the rate of random testing was increased to 200 percent at Browns Ferry Nuclear Plant from May 6 through July 5, 1991. There were no random positives during the 200-percent testing.

**FITNESS FOR DUTY PROGRAM**

# Performance Data Personnel Subject to 10CFR 26

Tennessee Valley Authority

June 30, 1991

COMPANY

6 MONTHS ENDING

Browns Ferry Nuclear Plant

LOCATION

Pam Hamilton, Fitness for Duty Coordinator

(615) 751-5024

CONTACT NAME

PHONE (INCLUDE AREA CODE)

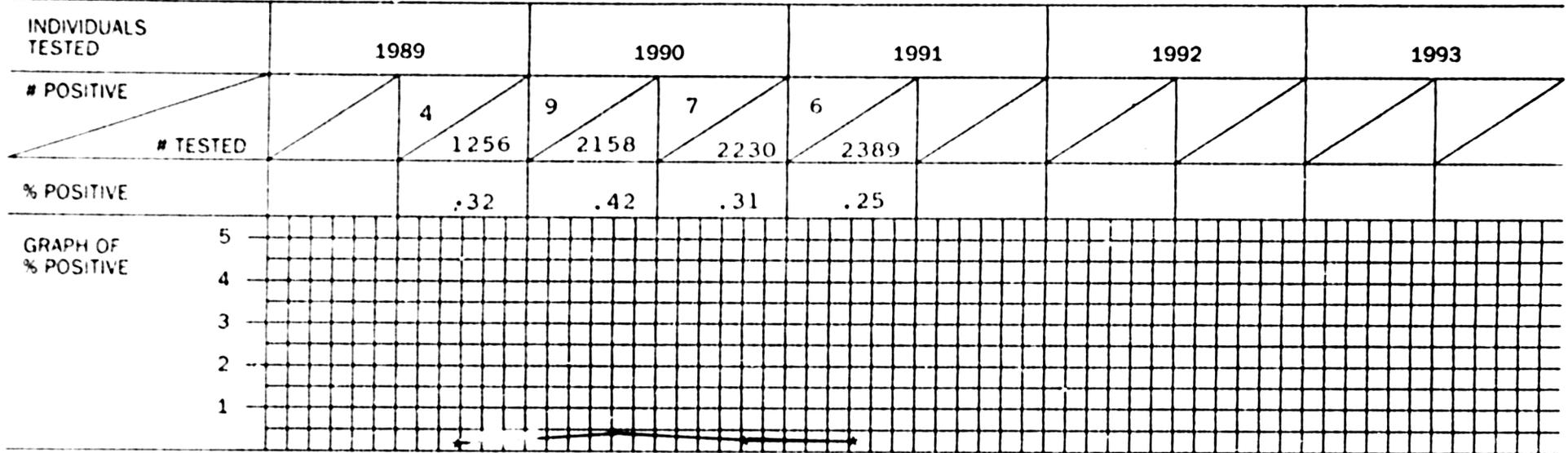
CUTOFFS: SCREEN/CONFIRMATION (ng/ml)  APPENDIX A TO 10CFR 26

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	2964				N/A	N/A	456	
PRE-EMPLOYMENT	573	2					408	0
PRE-BADGING	41	1					45	0
PERIODIC	N/A	N/A					N/A	N/A
FOR CAUSE	1	0					0	0
POST ACCIDENT	0	0					0	0
RANDOM	1982	4					407	2
FOLLOW UP	34	0					N/A	N/A
OTHER	229	2					0	0
<b>TOTAL</b>	<b>2860</b>	<b>9</b>					<b>860</b>	<b>2</b>

\*In two different work units, 219 employees were tested due to suspect substances found onsite. Ten employees were tested because they were <sup>7/21/89</sup> (OVER

**RANDOM TESTING PROGRAM RESULTS**



**CONFIRMED POSITIVE TESTS FOR SPECIFIC SUBSTANCES**

MARIJUANA		9	2	8					
COCAINE		5	6	1					
OPIATES		2	0	1					
AMPHETAMINES		0	0	0					
PHENCYCLIDINE		0	0	0					
ALCOHOL		3	2	0					

Enclosure 3

SUMMARY OF MANAGEMENT ACTIONS FOR  
SEQUOYAH 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 only one person tested positive. This was a licensee employee who was referred to the Employee Assistance Program. The employee was returned to work 52 calendar days after the Medical Review Officer confirmed the positive test result, and the employee is in the followup testing program.

**FITNESS FOR DUTY PROGRAM**

# Performance Data Personnel Subject to 10CFR 26

Tennessee Valley Authority

June 30, 1991

COMPANY  
Sequoyah Nuclear Plant

LOCATION  
Pam Hamilton, Fitness for Duty Coordinator

CONTACT NAME

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	1646				N/A	N/A	104	
PRE-EMPLOYMENT	320	3					5	0
PRE-BADGING	72	0					76	0
PERIODIC	N/A	N/A					N/A	N/A
FUR CAUSE	6	0					0	0
POST ACCIDENT	0	0					0	0
RANDOM	1168	1					74	0
FOLLOW-UP	25	0					N/A	N/A
* OTHER	17	0					0	0
TOTAL	1608	4	1	1			155	0

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

**RANDOM TESTING PROGRAM RESULTS**

INDIVIDUALS TESTED	1989		1990		1991		1992		1993	
# POSITIVE	2	7	6	1						
# TESTED	704	1616	1760	1242						
% POSITIVE	.28	.43	.34	.08						
GRAPH OF % POSITIVE										

**CONFIRMED POSITIVE TESTS FOR SPECIFIC SUBSTANCES**

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

Enclosure 4

SUMMARY OF MANAGEMENT ACTIONS FOR  
WATTS BAR NUCLEAR PLANT

No prospective licensee employees tested positive during this reporting period in the pre-employment category.

In the random testing category, three licensee employees and one contractor employee tested positive. Another contractor employee refused the random test. Both contractor employees were removed from TVA property and returned to the contractor. One licensee employee was removed from work activities and referred to the Employee Assistance Program (EAP). The employee was returned to work 36 days after the Medical Review Officer confirmed the positive and is in the followup program. The second employee (hourly employee) was terminated from TVA employment and informed that EAP would be available for information concerning sources of counseling and/or treatment in the community. The third employee had his employment with TVA terminated because he had another positive in the random program in 1989.

One licensee employee who tested positive during the reporting period ending December 31, 1990, tested positive in the followup testing program. This person's TVA employment was terminated.

One contractor employee was tested for cause based on an anonymous tip. This person tested positive and was removed from TVA property and returned to the contractor. Because the allegation involved a person responsible for administering the FFD program, the NRC Operations Center was notified. The TVA Inspector General was called in to investigate the allegation that the contractor was not in the random program because he was being aided by a TVA Watts Bar Human Resource employee. The investigation revealed that the TVA employee had not assisted the contractor in circumventing the random program, but that a data entry error on the part of another employee had caused the contractor to not be in the random program. TVA has an ongoing, internal audit system to help identify data entry problems of this nature.

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

Tennessee Valley Authority

June 30, 1991

COMPANY

6 MONTHS ENDING

Watts Bar Nuclear Plant

LOCATION

Pam Hamilton, Fitness for Duty Coordinator

(615) 751-5024

CONTACT NAME

PHONE (INCLUDE AREA CODE)

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

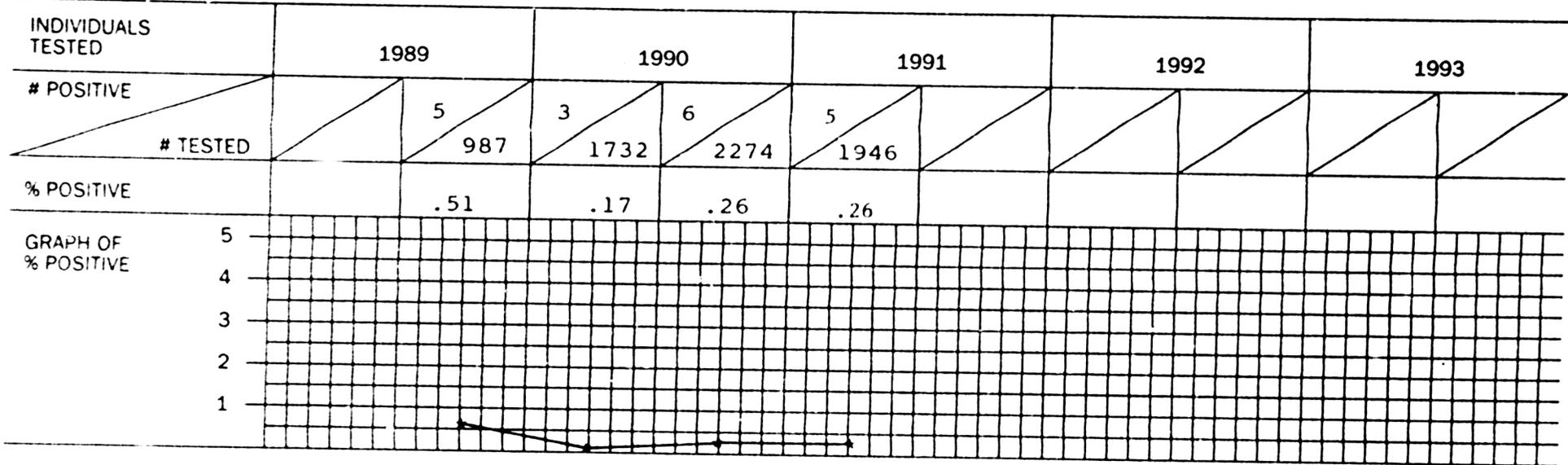
MARIJUANA	/	AMPHETAMINES	/	_____	/
COCAINE	/	PHENCYCLIDINE	/	_____	/
OPIATES	/	ALCOHOL (% BAC)	/	_____	/

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	N/A		
PRE-EMPLOYMENT	477	0					283	0
PRE-BADGING	0	0					2	0
PERIODIC	N/A	N/A					N/A	N/A
FOR CAUSE	0	0					1	1
POST ACCIDENT	0	0					0	0
RANDOM	1526	3					420	2
FOLLOW-UP	12	1					N/A	N/A
** OTHER	5	0					N/A	N/A
TOTAL	2020	4	1	1			706	3

\*This is a construction site at which unescorted access has not been established. SEE OTHER SIDE

7/21/89

**RANDOM TESTING PROGRAM RESULTS**



**CONFIRMED POSITIVE TESTS FOR SPECIFIC SUBSTANCES**

MARIJUANA			10	9	2					
COCAINE			3	5	4					
OPIATES			1	2	0					
AMPHETAMINES			0	1	0					
PHENCYCLIDINE			0	0	0					
ALCOHOL			1	2	0					

Enclosure 5

SUMMARY OF MANAGEMENT ACTIONS FOR  
BELLEFONTE NUCLEAR PLANT

No prospective licensee employees tested positive during this reporting period.

One contractor employee tested positive in the random testing category. The individual was removed from TVA property and returned to the contractor.

One TVA NP employee tested positive in the for cause category. The individual's TVA employment was terminated.

**FITNESS FOR DUTY PROGRAM**

# Performance Data Personnel Subject to 10CFR 26

Tennessee Valley Authority

June 30, 1991

COMPANY  
Bellefonte Nuclear Plant

6 MONTHS ENDING

LOCATION  
Pam Hamilton, Fitness for Duty Coordinator

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	177	0					122	0
PRE-BADGING	N/A	N/A					N/A	N/A
PERIODIC	N/A	N/A					N/A	N/A
FOR CAUSE	2	1					0	0
POST ACCIDENT	0	0					0	0
RANDOM	209	0					66	1
FOLLOW UP	0	0					N/A	N/A
**OTHER	3	0					N/A	N/A
TOTAL	391	1	0	0			188	1

\*This is a construction site at which unescorted access has not been established. SEE OTHER SIDE

**RANDOM TESTING PROGRAM RESULTS**

INDIVIDUALS TESTED	1989		1990		1991		1992		1993	
# POSITIVE		0	0	0	1					
# TESTED		51	91	102	275					
% POSITIVE		0	0	0	.36					

GRAPH OF % POSITIVE	5										
	4										
	3										
	2										
	1										

**CONFIRMED POSITIVE TESTS FOR SPECIFIC SUBSTANCES**

MARIJUANA			0	0	1					
COCAINE			0	0	0					
OPIATES			0	0	0					
AMPHETAMINES			0	0	0					
PHENCYCLIDINE			0	0	0					
ALCOHOL			0	0	1					

Enclosure 6

SUMMARY OF MANAGEMENT ACTIONS FOR  
CORPORATE NUCLEAR POWER OFFICES

One prospective licensee employee tested positive in the pre-employment category during this reporting period. This individual was not hired by TVA and will not be considered for employment in TVA's Nuclear Power (NP) organization for the next three years.

In the random testing category, two Knoxville employees tested positive. Both employees were referred to the Employee Assistance Program (EAP). One employee was returned to work 35 days after the Medical Review Officer confirmed the positive and is in the followup program. The other employee did not return to work during this reporting period. Because one of the employees was a supervisor for the TVA Communications organization and a member of the Emergency Response Team, the Nuclear Regulatory Commission Operations Center was notified.

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

Tennessee Valley Authority

June 30, 1991

COMPANY  
Corporate Offices (Chattanooga, Knoxville, Other)

6 MONTHS ENDING

LOCATION  
Pam Hamilton, Fitness for Duty 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	78	1					37	0
PRE-BADGING	N/A	N/A					N/A	N/A
PERIODIC	N/A	N/A					N/A	N/A
FOR CAUSE	2	0					0	0
POST ACCIDENT	0	0					0	0
RANDOM	392	2					13	0
FOLLOW-UP	2	0					N/A	N/A
OTHER	18	0					N/A	N/A
** TOTAL	492	3	2	1			50	0

SEE OTHER SIDE

7/21/89

**RANDOM TESTING PROGRAM RESULTS**

INDIVIDUALS TESTED	1989		1990		1991		1992		1993	
# POSITIVE	2	2	0	2						
# TESTED	261	450	223	405						
% POSITIVE	.77	.44	0	.49						

GRAPH OF % POSITIVE	1989	1990	1991
5			
4			
3			
2			
1			

**CONFIRMED POSITIVE TESTS FOR SPECIFIC SUBSTANCES**

MARIJUANA		0	2	0					
COCAINE		0	3	1					
OPIATES		0	0	0					
AMPHETAMINES		0	0	0					
PHENCYCLIDINE		0	0	0					
ALCOHOL		0	1	2					

## Enclosure 7

SUMMARY OF FITNESS FOR DUTY EVENTS  
REPORTED TO NUCLEAR REGULATORY COMMISSION OPERATIONS CENTER

JANUARY - JUNE 1991

<u>Event</u>	<u>Date of Notification</u>	<u>Job Title</u>	<u>Substance</u>	<u>Method Discovered</u>	<u>Action Taken</u>
91-001	02/08/91	Contractor	Marijuana	An anonymous phone call concerning a contractor employee at Watts Bar Nuclear Plant (WBN) not in the random population. The contractor employee was allegedly being aided by WBN employee whose duties included administration of the FFD program onsite.	For cause tested contractor employee. Test was positive. Contractor employee removed from TVA property. Removed TVA employee from FFD duties until TVA Inspector General's investigation was complete. Allegations unsubstantiated.
91-002 (NRC Event # 20898)	04/26/91	Radiological Control Office Browns Ferry Nuclear Plant (BFN)	Marijuana	Marijuana found in coffee grounds on 02/22/91, in the Radiological Protection Office at BFN. The substance had been sent to the Alabama Forensic Lab, Huntsville. Results received 4/26/91.	Testing of all Radiological Protection employees. TVA's Inspector General investigated. Two hundred percent random testing from May 6, 1991, July 5, 1991.
91-002	05/09/91	Work Control BFN	Marijuana	Followup to event # 20898. TVA is not sure if positive substance was from substances found 2/22/91 or 3/16/91 in the Work Control organization.	Testing of all Work Control employees. TVA's Inspector General investigated the February 22, 1991, incident. Two hundred percent random testing from May 6, 1991 to July 5, 1991.
91-003	06/18/91	Supervisor in TVA Communications organization. Emergency Response Team member.	Alcohol	Random testing	Removal from Emergency Response duties. Referred to TAP. This employee did not have unescorted access.

5512X

4488m

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

9011070004

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 (MSPB) 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.

ANALYSIS 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).<sup>1</sup>

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,<sup>2</sup> 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

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

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

screening.<sup>3</sup> 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.<sup>4</sup> While recent decisions of the United States Supreme Court have

<sup>3</sup> 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.

<sup>4</sup> 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.<sup>5</sup> 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

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<sup>5</sup>Although 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 intrusion<sup>6</sup> 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.<sup>7</sup> 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

<sup>6</sup> 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.

<sup>7</sup> 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 ('988), *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).

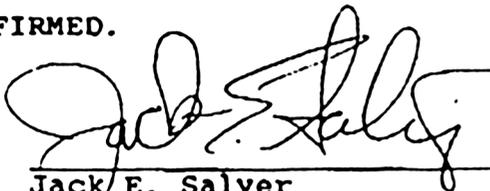
In contrast to the aggravating factors discussed, *supra*, I find that the mitigating factors here are the appellant's nearly 23 years of service with the agency, his undisputed satisfactory or better service during that period, the lack of any prior disciplinary actions, and, especially, the undisputed 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.

FOR THE BOARD:



Jack E. Salyer  
Administrative Judge

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

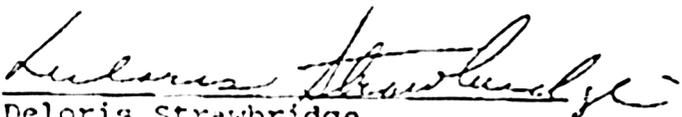
Agency's Representative

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

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

910729D063

Appellant,
v.
TENNESSEE VALLEY AUTHORITY, Agency.

DOCKET NUMBER  
SL07529010318

DATE: JUL 25 1991

Clinton, Tennessee, pro se.

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

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on November 5, 1990, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final

decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

Route 7, Box 231  
Clinton, TN 37716

By regular mail to:

Edward R. Patrick, Esq.  
Office of the General Counsel  
Tennessee Valley Authority  
400 West Summit Hill Drive  
Knoxville, TN 37902-1499

Marjorie Marks  
Office of Personnel Management  
Employee Relations Division  
1900 E Street, N.W., Room 7412  
Washington, DC 20415

Merit Systems Protection Board  
St. Louis Regional Office  
911 Washington Avenue, Suite 615  
St. Louis, MO 63101-1203

By hand to:

Office of Special Counsel  
1120 Vermont Avenue, N.W.  
Washington, DC 20005

JUL 25 1991

(Date)

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board