DEPARTMENT OF HEALTH & HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Mental Health Services
Center for Substance Abuse Prevention
Center for Substance Abuse Treatment
Rockville MD 20857

APR 0 5 2010

TO: Federal Executive Branch Agencies
FROM: Interagency Coordinating Group Executive Committee
SUBJECT: Updated Guidelines for Selection of Testing Designated Positions

2010 Guidance for Selection of Testing Designated Positions (TDPs)

I. Purpose

Effective immediately, this guidance supersedes, but does not fundamentally change, the previous Testing Designated Position (TDP) guidance issued on August 2, 1999. This guidance document will serve as the primary agency reference for selecting and/or reviewing positions designated for random testing under the Federal Drug-Free Workplace Program established pursuant to Executive Order No. 12564.

A. Selection Categories

The 1999 guidance consolidated the results of court decisions and established specific categories of TDPs. In January 2010, the Department of Justice reviewed legal activity since the issuance of the 1999 guidance and concluded that there were no decisions altering the following TDP categories:

- **Presumptive Positions:** Must be included in all plans. Agencies desiring to ***exclude*** any of these positions must submit a written justification for doing so. Exclusions require the prior written approval of the Interagency Coordination Group Executive Committee (ICGEC).
- **Preferred Positions:** Should, but may not be included in all plans. Agencies desiring to ***exclude*** any of positions must provide a clear justification for doing so.
- **Discretionary Positions:** Agency specific. Agencies desiring to ***include*** such positions must present a clear justification for doing so, including a detailed description/statement of the immediate risks posed by incumbents using illegal drugs.
- **Disfavored Positions:** May not be included in any plan.

B. Review Process

The 1999 TDP Guidance established the role of the Office of National Drug Control Policy in assuring appropriate consistency among the Executive Branch agencies implementing Executive Order 12564 and to convene the Interagency Coordinating Group Executive Committee (consisting of representatives of the Office of National Drug Control Policy, Department of Health and Human Services, Department of Justice and Office of Personnel Management) to provide concurrence reviews on agencies seeking to implementing substantive changes in their agency plans or TDP lists. These roles and processes remain in place.

Agencies are encouraged to seek informal, preliminary consultation on proposed substantive changes and submit their draft proposals to: The ICG Executive Committee, c/o Hyden S. Shen, Esq., Policy Oversight Lead, Federal Drug Free Workplace Program, Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), Division of Workplace Programs, 1 Choke Cherry Road, Room 2-1029, Rockville, Maryland, 20857. Telephone: (240) 276-2600.

Agency proposals should consist of the following information:

- A detailed statement describing the change(s) sought in the plan and the proposed language
- Job descriptions or a summary of the duties performed by positions proposed for inclusion in the random testing pool
- Justification for inclusion of each position (In some cases, group justifications may suffice for positions that share common duties and fall under the same TDP category.)
- **Supporting opinion from agency General Counsel**

II. The Legal Framework

Based upon the prior agency program litigation, the courts have been able to establish "limits" on the TDP justifications for the presumptive, preferred, discretionary and disfavored positions noted below. However, given unique agency missions, a substantial gray area continues to exist within the TDP categories.

Agencies are advised to seek agency counsel review prior to proposing changes or additions to their TDP lists. The most significant and instructive cases in this field continues to be the early pronouncements within United States Supreme Court in *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab,* 489

U.S. 656 (1989). Additionally, the Supreme Court has upheld the constitutionality of drug testing programs in other contexts, such as interscholastic athletics. See *Vernonia School District 47J v. Acton, 515 U.S. 646 (1995)* and "students in competitive extra-curricula activities", *Board of Education Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002).*

A. Presumptive Testing Designated Positions

In light of the well established case law and clear public interest in testing certain categories of positions, the positions set forth below have been approved for inclusion in agency testing plans without the prior approval of the ICG Executive Committee. In order to improve consistency, it is essential that individual agencies include all positions in these categories in their plans, unless a clear and compelling reason can be provided for not doing so. Indeed, almost all agencies already test these positions.

Since courts have consistently found that testing of these safety-sensitive positions is justified, agencies need not submit for consultative review, their plan to include these positions as TDPs. However, an information copy of implemented changes should be forwarded to the ICG Executive Committee. If an agency head is of the opinion, that unique agency circumstances warrant the exclusion of all or some of the positions in these categories, these circumstances should be presented in writing to the ICG Executive Committee for consultative review. The positions that **must** be included in your agency plan are as follows:

1. Employees Who Carry Firearms

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

2. Motor Vehicle Operators Carrying Passengers

NTEU v. Yeutter, 918 F.2d 968, 972 (D.C. Cir. 1990). *AFGE v. Skinner,* 885 F.2d 884, 889 n.8 (D.C. Cir. 1989), *cert. denied,* 495 U.S. 923 (1990). This category also includes operators of motor vehicles weighing more than 26,001 pounds and operators of motor vehicles transporting hazardous

materials. *Intern. Broth. of Teamsters v. Department of Transportation,* 932 F.2d 1292 (9th Cir. 1991). Note: Department of Transportation regulations implementing the Omnibus Transportation Employee Testing Act of 1991 require random testing for drugs and alcohol of Federal employees who operate vehicles that require a commercial driver's license. A commercial license is required for vehicle operators who: (1) carry 16 or more passengers, (2) transport hazardous materials, or (3) operate vehicles weighing 26,001 pounds or more.

3. Aviation Flight Crew Members and Air Traffic Controllers

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

4. Railroad Operating Crews

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

B. Preferred Testing Designated Positions

The well established law and clear public interest applicable to drug testing make it evident that the categories set out under this section represents strong government interests for drug testing and should almost always need established judicial standards. However, inclusion of the following positions as TDPs is not presumptive. To ensure reasonable uniformity, agencies will be required to present for ICGEC consultative review, agency-specific justifications for testing these positions. Agencies choosing to exclude one or more positions as a TDP will be required to justify their decision to the ICG Executive Committee.

1. Certain Health and Safety Positions

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

a. Employees authorized to carry firearms

NTEU v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384, 1393-94 (1989). This category was changed from "employees having access to firearms". In many cases, there are guards or security personnel who do not regularly carry a firearm, but are authorized to carry one in some circumstances, e.g.

emergencies. The rationale for including these positions as TDPs is the same as employees with a security clearance who see classified documents only rarely--granting security clearances in advance proved flexibility and ensures employees can be given access to classified material as soon as the need arises. See *Harmon v. Thornburgh,* 878 F.2d 484, 492 (D.C. Cir. 1989), *cert. denied,* 493 U.S. 1056 (1990).

b. Railroad Employees Engaged in Safety Sensitive Tasks

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

c. Aviation Personnel

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

2. Presidential Appointees Requiring Senate Confirmation (PAS)

The second major preferred category involves presidential appointees requiring Senate confirmation (PAS). While including PAS positions as TDPs is strongly preferred, an agency head may determine that it is impractical for part-time presidential appointees who sit on commissions or boards which

meet only three or four times to be included in the TDP. In this instance, the PAS may potentially qualify for an exclusion.

3. Front Line Law Enforcement Personnel

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

4. Drug Rehabilitation Employees

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

5. Personnel Having Access to "Truly Sensitive Information"

The fifth major preferred category is personnel having access to "truly sensitive information." For example, individuals with access to national security material that a "reasonable person" would consider damaging to national interests if compromised. *Von Raab,* 109 S. Ct. at 1396. Specifically, these positions include:

a. Top Secret and Higher Clearances

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

b. Secret Clearances

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

C. Discretionary Designations

In addition to the categories of positions identified for presumptive and preferred inclusion in agency plans, there are other agency specific sensitive positions which may warrant designation for testing. The presumptive and preferred testing categories are not exhaustive of TDPs supported by case law. For example, courts have supported testing for: confidential security clearances holders, *NTEU V. Hallet,* No. 86-3522 (E.D. LA. Feb 7, 1991); health care professionals responsible for direct patient care, and firefighters, AFGE *v. Derwinski,* 777 F. Supp. 1493 (N.D. Cal. 1991). Other federal district courts also have upheld random testing for medical doctors (except for doctors performing research or administrative duties), nurses, nursing assistants, pharmacists, and medical technicians because they were involved in direct patient care.

Given the unique agency missions, there are a number of other, non-court tested TDPs that may be appropriate for inclusion within agency plans. To the extent that agencies have identified potential TDP positions, they will be required to submit Appendix A of its plan with supporting documentation to the ICG Executive Committee for consultative review. The agency's plan must contain a statement indicating a clear nexus between the employee's duties and the feared harm to others for each TDP.

D. Specifically Disfavored Testing Designated Positions

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

1. Positions designated based upon the need to foster public trust or generalized requirements for integrity, honesty, or responsibility. *NTEU v. Yeutter, 918 F.2d 968, 972 (D.C. Cir. 1990)* and *Chandler v. Miller, 502 U.S.*

305 (1997) in which random testing cannot be utilized merely for "symbolic" testing. The Chandler case involved candidates for public office.

2. Positions designated based upon access to sensitive information not meeting the "truly sensitive" criteria, e.g. personnel files, budget and financial information, and grand jury information also is inadequate. *Harmon v. Thornburgh,* 878 F.2d 484, 492 (D.C. Cir. 1989), *cert. denied,* 110 S. Ct. 865 (1990). Many questions were raised about including inspector general employees because of their access to sensitive information and budget or financial employees because of their influence on large sums of money. Under current case law, neither group qualifies as a TDP. The rationale for excluding inspector general employees is contained in the *Harmon case.* In *Harmon,* the court approved employees with top secret clearances as TDPs because of their access to "truly sensitive" information, but it refused to approve as TDPs federal prosecutors or employees with access to secret grand jury proceedings. The court stated that "truly sensitive" does not include all information which is confidential or closed to public view. The rationale for excluding budget and financial employees is found in *AFGE v. Carazoes,* 721 F. Supp. 1361 (D.D.C. 1989), where the court refused to approve as TDPs a group of computer employees involved with billions of dollars of government resources who might be subjected to bribery, fraud, waste or mismanagement. The court concluded that program information which affects large sums of money does not necessarily mean the information is "truly sensitive". The clearest examples of "truly sensitive" remain information requiring a top secret clearance, where by definition, national security would be seriously damaged by an unauthorized disclosure.