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FEDERAL EMPLOYEE DRUG TESTING

Statement of
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Before the
Subcommittee on Human Resources
Committee on Post Office and Civil Service
United States House of Representatives



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Mr. Chairman and Members of the Subcommittee, it is a pleasure to appear before you today to comment on the Office of Personnel Management's (OPM) guidelines for establishing a drug-free Federal workplace and the Health and Human Services' (HHS) companion technical guidelines concerning the operation of drug testing programs.

Executive Order 12564 requires that the head of each Executive agency establish a program to test employees for the use of illegal drugs. As directed by the Order, OPM issued guidelines on November 28, 1986, which are intended to provide governmentwide guidance on the implementation of the Executive Order. Also pursuant to the Executive Order, HHS issued scientific and technical guidelines on February 13, 1987. While these guidelines provide further instruction concerning the implementation of the Executive Order, we are concerned that they do not address in sufficient detail, or at all, certain aspects of how the testing programs will operate. Specifically, we have four areas of concern:

- programs may not be uniform since agency interpretation of some requirements in the guidelines may vary considerably and thus similarly situated employees may not be assured similar treatment;
- employee rights are not fully addressed;
- no provision exists for continuing, centralized oversight; and
- how much the program will cost continues to be unknown.

Guidelines provide wide latitude to agencies

We testified before this Subcommittee in September of last year that the definition of "employee in a sensitive position" in the Executive Order was very broad and could be interpreted to cover a substantial part of the federal workforce.¹ The OPM guidelines provide further procedural directions for identifying employees in sensitive positions to be tested, but the definition of "employee in a sensitive position" is the same as that in the Executive Order. Furthermore, the guidelines allow the head of each agency to determine from those sensitive positions for which randomized testing is authorized, which positions should be subject to testing. Thus, it is possible that employees in one agency will be identified as holding designated positions but not employees in another agency holding similar positions with similar responsibilities.

Equity and fairness seem to dictate that if federal employees are to be subject to drug testing programs, such programs should be structured so that uniform criteria are consistently applied to all federal workers. The OPM and HHS guidelines, however, provide wide latitude to agencies and could result in notable differences between agency programs.

¹ In our comments there and in earlier comments on H.R. 4636 (99th Cong., 2nd Sess. (1986)) we addressed certain constitutional problems about the drug testing programs provided for. Consistent with your request, we have not again addressed those issues here.

The HHS guidelines specify that, at a minimum, each agency shall test for marijuana and cocaine. The agencies are also authorized to test for opiates, amphetamines, PCP, and can seek authority from HHS to test for other drugs as well. The selection of these three drugs as well as others to test for, however, is up to each agency. How are agencies to make this determination? Neither the OPM nor HHS guidelines provide any rationale, criteria, or procedure for determining what other drugs should be screened, or not screened.

An agency decision not to test for certain drugs of abuse may inhibit the goal of having a drug-free workplace. Employees may be free of those targeted drugs but not necessarily others. It can also create a situation where employees in some agencies might be screened for use of a broader variety of drugs of abuse than employees in other agencies.

The guidelines direct agencies to discipline the employee who has a confirmed positive drug test. The OPM guidelines cite a specific list of disciplinary actions that an agency may take upon the first confirmed determination that an employee uses illegal drugs. Such actions range in severity from reprimanding the employee in writing to removing the employee from federal service. The guidelines note that agencies have discretion in determining which actions to take. Again, there may arise a situation where an employee with a first time, confirmed, positive test for a particular drug is given a written reprimand in one agency, while another employee in the same situation in a different agency, or

perhaps even in the same agency, is dismissed. The OPM guidelines do not preclude this, nor do they discuss any specific criteria to apply in determining the choice of which disciplinary action to take except that the disciplinary measures must be consistent with the Civil Service Reform Act.

The Executive Order provides that drug testing shall not be performed under the Order for the purpose of gathering evidence for use in criminal proceedings and that agencies are not required to report testing information to the Attorney General. It might be interpreted, however, that agencies are not prohibited from disclosing test results to the Attorney General. On the other hand, the OPM guidelines seem to preclude agencies from disclosing test results to the Attorney General absent consent of a tested employee. We think the limitation in the guidelines sound; however, we note the discrepancy.

The guidelines provide several significant controls over employee records, and specify conditions under which written consent of the employee is required for disclosure of individual drug test results and treatment/rehabilitation records. The HHS guidelines specify that agency and contractor records containing drug testing data on employees will be a Privacy Act system of records. The guidelines do not provide any details as to how the maintenance of these record systems will affect confidentiality.

A system of records is defined by the Privacy Act as any group of records under the control of an agency from which information is retrieved by an individual's name or some identifying number. The

act restricts disclosure by federal agencies of personally identifiable information, unless the record subject consents or unless the records fall under one of 12 exceptions. One exception to this rule involves the "routine use" provision, defined as the use of a record for a purpose which is compatible with the purpose for which the record was collected.

Routine use notices are of particular concern with regard to confidentiality of records because some agencies have developed broad routine use justifications that permit extensive disclosure. Consequently, even though the OPM and HHS guidelines limit disclosure of test results, other disclosures might be made pursuant to routine uses established with the Privacy Act systems of records. For example, a common routine use established by some agencies is to authorize disclosure of records to other agencies when related to the hiring of employees, issuance of security clearances, or other benefits.

Another exception in the Privacy Act is that which allows disclosure to agencies for a civil or criminal law enforcement activity. Although neither the Executive Order nor the guidelines specifically allow for disclosure on this basis, there is no mention in either about how the Privacy Act would affect these restrictions.

The OPM guidelines also indicate that an agency may require follow-up testing on a confirmed drug-using employee during or after counseling or rehabilitation. Depending on how each agency chooses to implement this testing component, employees undergoing

or completing treatment in some agencies may be targeted for additional tests while in other agencies this may not be the case. It is also unclear how long an employee in this category would be subject to retesting on this basis. Would the employee be subject to unlimited retesting over the span of a 30-year career?

The OPM guidelines are clear about the consequences of a second confirmed positive test--dismissal. There is no discussion of any time limit between a first and second confirmed positive test that would stay this mandatory dismissal. An employee who tested negative for several years would be dismissed on the occurrence of a second confirmed positive test. There is no instruction in the guidelines specifically prohibiting or authorizing agencies to establish a time limit in which two confirmed positive tests constitutes a basis for dismissal. If the interval between tests was substantial, an adverse action based on the second test might conflict with the Civil Service Reform Act.

The HHS guidelines provide extensive specification of the collection and test procedures to be followed by agencies in testing employees for drugs. They also provide some description of the lab quality control procedures to be followed. The guidelines note that any unsatisfactory blind proficiency testing result must be investigated by the agency and corrective actions must be taken. Unsatisfactory performance on proficiency test samples is sufficient cause for lab accreditation to be revoked. The HHS guidelines do not, however, specify what degree of error (false positives or false negatives) would be considered unsatisfactory,

nor do they note any conditions or criteria that specifically describe what is meant by unsatisfactory performance.

Conceivably, labs that perform poorly on proficiency tests may still continue testing operations while they take corrective actions. If quality assurance functions are to be conducted by each agency as the guidelines indicate, then standards for lab review and criteria for revocation of accreditation may vary. Since one lab may perform analyses for several agencies, it could create a situation where one agency considers the lab's performance satisfactory while another agency does not.

The guidelines also provide that should a false positive error occur on a blind proficiency test, retesting of all specimens submitted to that lab for the period of 2 weeks prior to the detected error and 2 weeks after is required. This situation, however, is not specifically identified as constituting unsatisfactory performance. There is also no indication in the guidelines as to why individuals tested 15 or more days before or after the false positive do not need to be retested. If the interval between proficiency tests were 30 days, for example, and the last proficiency test showed a false positive, only those specimens in the prior 14 days would be retested. Those specimens, especially those with positive results, tested during the initial 16 days would not be retested, although they too might have been subject to a false positive result.

Employee rights and protections

Both the OPM and HHS guidelines contain provisions regarding protection of employees' rights. The OPM guidelines specify that employees are to be provided with a notice that test results will be handled with maximum respect for individual confidentiality, consistent with safety and security. The guidelines also instruct the agencies to provide employees with notice (1) that they may submit supplemental medical documentation to support legitimate use of a specific drug, and (2) that counseling and rehabilitative services will be made available. However, questions about employee rights and protections remain.

While the OPM guidelines cite the Civil Service Reform Act, there is no detailed discussion of employee rights under this law. An important protection under the law is, with some exceptions, the need for an agency taking a disciplinary action to demonstrate a nexus or connection between the employee's off-duty conduct and job performance. The guidelines do not require that such a nexus be established before taking disciplinary action, only that the employee have a confirmed positive test. Depending on the position held by an employee, drug test results alone may not be sufficient to sustain a disciplinary action.

Agencies are also not given any information concerning the implementation of the guidelines in relation to the Rehabilitation Act of 1973 as amended which generally includes a drug abuser as a handicapped individual. Under this act, employees may, under certain conditions, be protected from adverse actions such as

discharge unless the agency can show impairment of the employee's job performance. Applicants, otherwise qualified for a position, but refused employment solely on the basis of a positive drug test may have a valid claim under this act. There is also no instruction to agencies that employees should be informed about relevant provisions of the Rehabilitation Act.

The Executive Order states that positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs and the guidelines refer to Civil Service Reform Act protections. Nevertheless, the guidelines do not instruct agencies to inform employees of procedures to challenge or rebut other aspects of the testing program such as the disciplinary actions. The guidelines are silent on such matters as applicant or employee right to access administrative or laboratory records, proficiency test results, or other material that may bear upon a challenge to test results.

Lack of oversight

The OPM/HHS guidelines do not provide for centralized oversight of employee drug testing governmentwide. Such an oversight responsibility could help ensure that all employees are treated equitably, that agencies comply with the respective guidelines, and that any needed modifications to either the guidelines or program operations are identified and implemented. At present, there is a diffusion of program responsibilities among

OPM, HHS, and the Department of Justice.

Also, there is no mechanism established in the guidelines for the continued, independent monitoring of each agency's drug testing program. While agencies and labs are directed by the guidelines to collect and maintain certain statistics about the drug testing program, there is no requirement that an agency evaluate its program. If such a requirement were added, criteria should be specified for assessing program effectiveness or efficiency.

Program costs

Finally, on the question of program costs, the OPM/HHS guidelines provide some insight into the elements that might be included in estimating the cost of drug testing programs. In addition to the costs associated with the actual testing activities as detailed in the HHS guidelines (e.g., specimen collection, lab testing, review by a medical officer), the guidelines indicate that activities such as employee rehabilitation and counseling, personnel actions, and supervisor training are also cost elements associated with the program. The wide latitude provided to agency heads in implementing an employee drug testing program, however, makes it difficult to estimate the costs of these programs until the number of employees to be tested as well as the drugs to be tested for is known.

Mr. Chairman, these are some of the concerns or questions not addressed by the OPM/HHS guidelines -- matters that, in accordance

with the Order, each agency head will need to address. We recognize the importance of providing each agency with sufficient flexibility to implement a testing program that is responsive to its individual needs and resources. However, in our opinion a more detailed set of standards than those provided in the guidelines will be necessary to ensure that a sound, consistent, and defensible set of programs are implemented governmentwide. This is particularly true in view of the fact that the guidelines do not provide any mechanism or procedure for oversight or review of the agency drug testing programs once they are implemented. Even with adequate oversight and review, we believe the emphasis in this program should be to take every precaution to make sure it is done right the first time.

This concludes my prepared comments. I would be happy to answer any questions you may have.