

GAO

Testimony

For Release
on Delivery
Expected at
9:30 a.m. EDT
Thursday
June 16, 1988

FEDERAL EMPLOYEE DRUG TESTING

Statement of
L. Nye Stevens, Associate Director
General Government Division

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



136078

045442/136078

FEDERAL EMPLOYEE DRUG TESTING

SUMMARY OF STATEMENT BY
L. NYE STEVENS
ASSOCIATE DIRECTOR
GENERAL GOVERNMENT DIVISION

GAO reviewed federal agency drug testing plans submitted to Congress in accordance with Section 503 of the Supplemental Appropriations Act of 1987, Public Law 100-71.

Based on its review of the drug testing plans prepared by civilian Cabinet level agencies and cost estimates prepared by the Office of Management and Budget, GAO identified several areas of concern with regard to program uniformity, employee rights, program costs, and the need for continuing oversight of the drug testing programs:

- Agencies vary in the positions identified as subject to drug testing, the frequency of testing, and the drugs to be tested for. As a result, a uniform set of testing criteria will not be applied to the federal workforce.
- Agency plans do not detail certain aspects of employee rights and agency disciplinary actions. The plans restrict applicant access to relevant drug test records and do not provide guidance concerning procedures to follow if an applicant chooses to challenge drug test results.
- OMB cost estimates show notable variances among the agencies. Estimated costs during Fiscal Year 1990 to identify drug users ranged from roughly \$3,400 to \$13,000 per drug user identified.
- No provision exists for centralized, continuing oversight of the drug testing programs. While agency plans provide for the collection of certain statistics, two relevant statistics--the number of employees terminated after a first confirmed positive test and the number terminated after a second confirmed positive test--are not included in agency reporting requirements.

Mr. Chairman, Madam Chairwoman, and Members of the Subcommittees, it is a pleasure to appear before you today to comment on the federal employee drug testing plans submitted to Congress in accordance with Section 503 of the Supplemental Appropriations Act of 1987, Public Law 100-71. This is the third time we have testified on the issue of federal employee drug testing. In September 1986 testimony before the Subcommittee on Human Resources we commented on, among other things, constitutional issues raised by the random drug testing program described in the President's Executive Order 12564 which authorized drug testing of federal employees. We continue to believe that these issues will ultimately be decided by the courts as we noted in that testimony.

We testified again before the Human Resources Subcommittee in May 1987 on concerns raised by our review of the drug testing guidelines issued to agencies by the Office of Personnel Management (OPM) and the Department of Health and Human Services (HHS) as required by the Executive Order. These concerns focused on four areas:

- the potential for programs to vary across agencies resulting in dissimilar treatment of employees,
- employee rights were not fully addressed,
- no provision existed for continuing, centralized oversight, and
- program costs were unknown.

Section 503 of the Supplemental Appropriations Act of 1987 required that HHS submit to Congress an agency-by-agency analysis of agency drug testing plans and a certification that the plans

were developed in accordance with Executive Order 12564 and applicable provisions of law. The HHS report submitted to Congress last month in compliance with Section 503 included the agency drug testing plans.

Today's testimony provides the results of our review of the 21 drug testing plans prepared by the 11 civilian Cabinet level departments. Two departments, Justice and Treasury, prepared separate plans for different agency components.

In order to provide guidance to agencies in the development of their plans, an Interagency Coordinating Group was established under the aegis of the National Drug Policy Board. This group developed a model plan to guide the agencies in the preparation of their individual plans.

In general, the agency plans follow this model plan, and as a result they are similar in wording. While the agency plans provide much additional detail about the drug testing programs, they still do not fully resolve the concerns we raised last year about the uniformity of the programs, employee rights or protections, program costs, and oversight.

Uniformity of drug testing programs

In our testimony last year we discussed the wide latitude provided agencies in determining what positions will be subject to testing, and the possibility that employees in one agency may be tested while employees holding similar positions in another

agency may not. We pointed out that equity and fairness seemed to dictate that if federal employees are to be subject to drug testing programs which are intrusive, all federal employees should be treated as consistently as possible.

Our analysis of the plans indicate that individuals will face a different set of testing circumstances depending on which agency is their employer. Employees who occupy testing designated positions, known as TDPs, will be subject to random testing. Drug testing plans show considerable variation in the TDPs identified and the frequency with which these TDPs will be tested annually. Across the plans we reviewed, the proportion of the workforce designated as occupying TDPs ranged from less than 1 percent at the Department of Treasury's Bureau of Public Debt to 100 percent at the Department of Justice's U.S. Marshals Service.

Our preliminary review of selected TDPs suggests that positions in one plan have been identified as TDPs while similar positions in another plan have not. For example, clerk typist positions having a critical-sensitive designation are identified as TDPs at the Department of Commerce. This designation is one of four categories used to classify positions in terms of national security risk. At HHS, this designation does not constitute a basis for identifying the position as a TDP. Other positions such as cook, teacher, and counselor have also been identified as TDPs in one agency but not in another.

The annual frequency at which TDP employees would be tested also varies. Since the reported rate of annual testing ranges from 4 percent to 100 percent, TDP employees will not be tested at a uniform rate governmentwide. For example, TDP employees at the U.S. Mint have a one in 25 chance of being tested annually while TDP employees at the Department of Education can expect to be tested once a year. The plans do not contain an explanation of how the frequency of testing was determined.

Applicant testing, post-accident testing, and follow-up testing are also not uniform. While the majority of plans indicate that only applicants for TDPs will be tested, five plans call for the testing of all applicants, and one plan does not include any applicant testing. For post-accident testing, one criterion for requiring a drug test is the amount of damage done to property. Depending on the agency, this monetary threshold has been set at values ranging from 200 dollars at the U.S. Marshals Service to 10,000 dollars at the Department of Agriculture.

All employees who are administratively referred to an employee assistance program for illegal drug use and complete a rehabilitation program are subject to follow-up testing. The period of time that employees are subject to this follow-up testing and the frequency with which employees will be tested during this period show significant differences. While the majority of plans set the duration of the follow-up testing period at one year, the Department of Agriculture stipulates that

the period will last at least two years with no indication what the maximum period might be. The specified rate at which follow-up testing will be done ranges across agency plans from once a month to three times in two years.

Employees within the same agency could also be subject to different rates of follow-up testing. There are plans that specify the minimum rate at which follow-up testing is to be done on employees but do not indicate what the maximum rate of testing would be. There are plans which stipulate that the rate of testing will be established on an individual case by case basis.

It appears that applicants and employees under some plans will be screened for fewer drugs than in other agencies. The majority of agencies plan to test for the five drugs -- marijuana, cocaine, opiates, amphetamines, and phencyclidine -- specifically authorized in the HHS technical guidelines. However, random testing at the Department of Housing and Urban Development as well as random and applicant testing at HHS and the Department of Treasury's Savings Bond Division will be limited to marijuana and cocaine. The Treasury's Bureau of the Public Debt will test for four of the authorized drugs but not amphetamines.

Taken as a whole, these differences in major components of the testing programs indicate that uniform testing criteria will not be applied to all federal workers and that employees will be treated dissimilarly. The differences among agencies might be

explained by the need for agency heads to exercise discretion in tailoring their agency's plans to meet specific needs. However, the HHS analysis of the plans did not address the rationales for the differences and, thus, we could not examine them.

Employee Rights and Protections

Agency plans contain provisions regarding protection of employees' rights. The confidentiality of test results and restrictions on disclosure as promulgated in Section 503 of the Supplemental Appropriations Act are specifically identified and addressed in the agency plans. However, the lack of detail or specificity regarding policies or procedures for certain other aspects of the plans continues to raise questions about how employees and applicants will be treated. We have identified several areas where it is not clear what actions an agency or an employee may take under circumstances that will probably arise in the operation of the program.

Agency plans include a section concerning the procedure to be followed if an employee believes that his or her position has been wrongly classified as a TDP subject to random testing. Eight plans, while noting the procedure for seeking administrative relief from this classification, did not identify the official who should receive and approve the employee's request for reconsideration.

Agency plans require that an employee who has a confirmed positive drug test be disciplined. For the most part, the plans follow the OPM guidelines closely by citing a specific list of disciplinary actions that an agency may take upon the first confirmed determination that an employee uses illegal drugs. The actions range in severity from a written reprimand to removing the employee from service. The Department of the Interior and HHS included the additional option of demotion as one of the explicit disciplinary actions that may be taken against an employee. All plans with the exception of HHS's included the option of suspending the employee until the employee successfully completes the rehabilitation program.

As we noted in previous testimony, the OPM guidelines did not provide any criteria to apply in determining the choice of which disciplinary action to take except that it should be consistent with the Civil Service Reform Act. With the exception of the U.S. Marshals' plan, which specifies that removal shall be proposed for a first finding of illegal drug use, agency plans do not provide any criteria as to what particular disciplinary action will be taken against an employee on the basis of a first time, confirmed positive test.

Agency drug testing plans do not discuss how program implementation will be affected by requirements to observe employee rights under the Civil Service Reform Act (CSRA) or the Rehabilitation Act of 1973. In our previous testimony, we expressed concern that the OPM drug testing guidelines did not

address the CSRA stipulation that an agency taking a disciplinary action demonstrate a nexus or connection between the employee's off duty conduct and job performance. There is no discussion of this issue in the drug testing plans. This would apply to those individuals who tested positive and those refusing to take the test since the latter are treated as if they tested positive.

Additionally, the plans make no specific reference to the Rehabilitation Act, which may also protect employees who are drug abusers from adverse actions such as discharge unless the agency can show impairment of the employee's job performance or a direct threat to property or the safety of others.

Some of the plans could also reduce protections provided in the Drug Abuse Office and Treatment Act. That Act prohibits individuals from being denied or deprived of federal civilian employment solely on the basis of prior drug abuse. This protection does not apply if the position is determined by the agency to be a sensitive position. All the plans state that all positions designated as TDPs are sensitive positions. Under the U.S. Marshals Service plan, everybody in the agency has been defined as occupying a sensitive position, including clerical employees. Thus, many employees under that plan would be excluded from the protections provided even though their counterparts at other agencies would not.

In the absence of further specificity in the plans, we remain concerned about how employees will be assured the rights and protections provided by law. The plans do include provisions

for employee access to their drug test results and relevant laboratory certification and review records as required in Section 503 of the Supplemental Appropriations Act.

Applicants, however, are not afforded access to these records under the plans even though they would appear to have a right of access under the Privacy Act and/or the Freedom of Information Act. The potential for laboratory error is no different for applicant testing than for employee testing, and there is no rationale presented in the plans for not providing these rights to applicants. We note also that the plans do not establish or describe procedures for applicants to follow if they choose to challenge a verified drug test result.

Program Costs

Estimates of program costs were prepared by the Office of Management and Budget (OMB) and submitted to Congress in accordance with Section 503 of the Supplemental Appropriations Act. The cost estimates provided by OMB are divided into two categories, testing related costs and other costs. Testing related costs include expenses for such things as specimen collection, laboratory analysis, medical review officers, and quality control. The non-test, or other, cost category includes employee education, supervisory training, and program administration.

Our review of OMB figures showed notable variations in drug program costs across agencies. OMB's guidance to agencies suggested that 5 percent or less of the tested population will test positive for drug use. Based on this 5 percent estimate, we calculate the agency's total cost per identified drug user in FY 1990 to range from 3,400 dollars at the State Department to 13,000 dollars at the Treasury Department. If less than 5 percent of the tested population were found to be positive, cost per identified drug user would be higher.

We found that test costs per person tested generally averaged around 63 dollars at almost every agency in the scope of our review. However, non-test costs per agency employee varied from roughly 4 dollars at the Department of Agriculture to 13 dollars at the Department of State.

It is important to note that the OMB estimates may not reflect the total costs associated with the drug testing programs. For example, neither the cost of employee assistance programs nor the cost of adverse actions was included in agency estimates according to OMB officials. In addition, the OMB estimates may not include cost of accident and reasonable suspicion testing since the cost of these components of the program were not requested in the OMB guidance.

Neither the OMB cost data nor the plans provided sufficient detail to explain the basis for the cost estimates or the variances. If it is of interest to the Subcommittees, the basis for these estimates can be the focus of future work.

Oversight Needed

Except for the HHS role in the certification and review of laboratories, there is no provision for continuing oversight or independent monitoring of drug testing programs governmentwide. While agency plans provide for the collection of statistics, there is no discussion of how they are to be used in evaluating the effectiveness or efficiency of the program in reaching its objective of a drug free workplace.

We note that among the statistics to be reported, two relevant statistics are not explicitly included in the statistical reporting plans: the number of employees terminated either after a first confirmed positive drug test or after a second confirmed positive test. The Department of Housing and Urban Development plan does include terminations for confirmed positive tests in the collection of statistical information, but does not distinguish between a first or second occurrence.

Based on the differences we have identified in the agency plans as well as the variances in program costs across agencies, we believe that continuing, centralized oversight would be valuable in assuring the best use of resources.

This concludes my comments. My colleagues and I would be pleased to answer questions you may have.