

## **FACT SHEET ON THE CONSEQUENCES OF A POSITIVE DRUG TEST**

The Secretary has determined that applicants for, and holders of, a DOE “Q” or “L” access authorization (security clearance) will be in Testing Designated Positions (TDP) as specified in DOE Order 3792.3, *Drug-Free Federal Workplace Testing Implementation Program*, for federal employees, and Title 10 Code of Federal Regulations, Part 707, *Workplace Substance Abuse Programs at DOE Sites*, for contractor employees. Accordingly, individuals who are either in, or are selected for, a TDP are subject to applicant, random, and ‘for cause’ testing. The information below summarizes the consequences of a positive test for drugs for each category of employment.

### **I. CONTRACTORS**

#### **A. Contractor applicant for contractor employment - employment consequences:**

Section 707.14(a) of DOE’s regulations governing workplace substance abuse programs at DOE sites states: “When an applicant for employment has been tested and determined to have used an illegal drug, processing for employment will be terminated and the applicant will be so notified.”

#### **B. Contractor applicant for DOE access authorization – security clearance consequences:**

DOE regulations are being revised as follows:

- Revise 10 CFR Part 710 Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material to reflect the Secretary’s decision of September 14, 2007, that requires applicants for security clearances to be drug free for a minimum of 12 months prior to being processed for DOE access authorization. Self admission of drug usage on the Standard Form 86, *Questionnaire for National Security Positions*, (SF-86) or as a result of a positive drug test will result in deferral of DOE’s consideration of the application for clearance. As amended, the new rule will be an expansion of current section 710.4, which identifies the various conditions that result in DOE suspending the processing of an application for access authorization.
- Revise the Department of Energy Acquisition Regulation Security Clause (48 CFR 952.204-2) to reflect the Secretary’s decision of September 14, 2007, that requires contractors to conduct a drug test of individuals to be submitted for a DOE access authorization. The current draft of this rule requires the contractor to furnish DOE the results of the drug test (as well as the other required ‘pre-employment’ checks). The reasonable approach would be for the contractor not to request a security clearance for an individual who has failed a drug test; however, historically, DOE procurement regulations do not dictate to the contractor how to adjudicate the results of pre-employment screening.

**C. Incumbent cleared contractor employee who tests positive for drugs - employment consequences:**

Section 707.14(b)(1) states that when an employee who is in a Testing Designated Position (TDP) has been tested and determined to have used an illegal drug for the first time, the employee may be offered a reasonable opportunity for rehabilitation, but the individual must be placed in a non-TDP, without access authorization, throughout the period of rehabilitation. This decision is the responsibility of the hiring contractor. Section 707.14(b)(2) states that failure of the employee to take the opportunity for rehabilitation can lead to disciplinary action up to and including removal from employment under the DOE contract, in accordance with the contractor's policies. In addition, any employee who is determined to have used illegal drugs a second time shall in all cases be removed from employment under the DOE contract. No changes to this practice are anticipated.

**D. Incumbent cleared contractor employee who tests positive for drugs – security clearance consequences:**

Currently due process under 10 CFR 710 provides the individual with the opportunity to request a hearing before a DOE Hearing Office and an additional appellate review however, 10 CFR Part 710 is now being revised to add a new section 710.4, "Policy" to provide that, if the decision to grant the access authorization was based upon favorable resolution of drug involvement and the individual signed a DOE Form 5631.9, *Drug Certification*, and there is new evidence of drug usage, then the access authorization will be administratively terminated. (Section 710.4 provides for limited review/appeal of administrative terminations, rather than the full hearing and appeal process under Part 710).

**II. DOE FEDERAL EMPLOYEES:**

**A. An applicant for a federal employment testing designated position at DOE who tests positive for drugs - Employment consequences:**

External applicants (employees new to DOE) are not appointed to a TDP. Internal applicants (current DOE employees) who are not currently employed in a TDP are not appointed to a TDP. Those employees are referred for counseling or rehabilitation by the employee's immediate supervisor. The test results are also shared with the selecting official for the TDP.

All applicants (external & internal) who have been tentatively selected for a TDP will be tested. Applicant Testing/Pre-employment consequences for a positive drug test:

- An external applicant with a positive drug test will not be appointed to the position. An internal applicant who tests positive for drugs will not be appointed to the position for which he or she had been tentatively selected.

- DOE Personnel Security and the employee's immediate supervisor will be notified of the positive test results.
- The immediate supervisor, with the assistance and/or guidance from the Drug Program Coordinator (DPC), Employee Relations, Employee Assistance Program (EAP), and in some cases Security, shall take steps to: refer the employee for counseling, execute a Drug Use Acknowledgement form, initiate follow up testing, and review a range of disciplinary actions.
- If the employee is currently in a TDP, the supervisor will remove the employee from his/her sensitive duties, request a temporary removal of the employee's name from the random testing pool while the employee is participating in a treatment program and when appropriate, return the employee to sensitive duties.

**B. DOE Federal candidates for access authorization – security clearance consequences:**

If HR makes a favorable suitability determination in spite of evidence of drug usage, the case is referred to the personnel security program for resolution. The individual has the opportunity under 10 CFR Part 710 to request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals and, in the event of an unfavorable ruling, to seek appellate review.

In accordance with the Secretary's decision of September 14, 2007, 10 CFR Part 710 is undergoing revision to add language to provide that applicants for security clearances must be drug free for a minimum of 12 months prior to being processed for DOE access authorization. Self admission of drug usage on the SF-86 or as a result of a positive drug test will result in deferral of the application for clearance. This will be an expansion of 10 CFR 710.4, "Policy," which states the various conditions that result in DOE suspending the processing of an application for access authorization. Additionally any applicant for a security clearance who tests positive will not be able to reapply for security clearance for 12 months.

**C. Incumbent DOE Federal employee in a TDP with a security clearance who tests positive for drugs - Employment consequences:**

Upon notification of a positive test by the Medical Review Officer (MRO), the Department through the Drug Program Coordinator will notify the supervisor. The supervisor, with guidance from the EAP and the servicing personnel office, shall remove the employee from sensitive duties, and consider a range of disciplinary actions. At the appropriate time the supervisor will initiate a Drug Use Acknowledgement form and the employee then will start a follow-up testing program. If any time during the follow-up program the supervisor is notified by the MRO that the employee has again tested positive, the supervisor will consider progressive disciplinary actions up to and including removal from federal service. All disciplinary actions should be coordinated with the appropriate human resources office.

**D. Incumbent DOE Federal employee who tests positive for drugs - security clearance consequences (assumes that a favorable suitability determination has been made by HR):**

Currently due process under 10 CFR 710 provides the individual with the opportunity to request a hearing before a DOE Hearing Officer and a further appellate review.

10 CFR 710 is undergoing revision to add a new sub-section in 710.4, "Policy," to provide that if the initial decision to grant the access authorization was based upon favorable resolution of drug involvement and the individual signed a DOE F 5631.9, "Drug Certification," and there is new substantiated evidence of drug usage, the access authorization will be administratively terminated. (10 CFR 710.4 allows for limited review/appeal of administrative terminations, rather than the full hearing and appeal process).