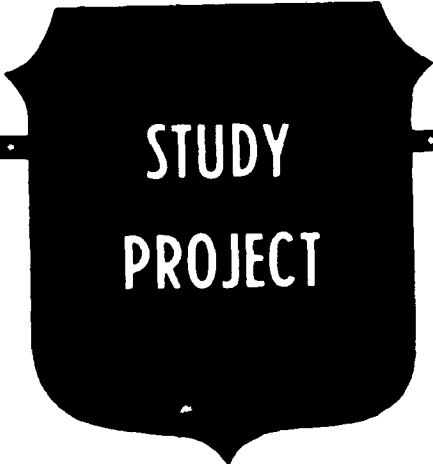


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RANDOM DRUG TESTING OF ARMY CIVILIAN EMPLOYEES

BY

LIEUTENANT COLONEL MICHAEL F. TARMAN

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3 APRIL 1989
U.S. ARMY WAR COLLEGE, CARLISLE BARRACKS, PA 17013-5050

REPORT DOCUMENTATION PAGE		READ INSTRUCTIONS BEFORE COMPLETING FORM
1. REPORT NUMBER	2. GOVT ACCESSION NO.	RECIPIENT'S CATALOG NUMBER
4. TITLE (and Subtitle) Random Drug Testing of Army Civilian Employees		TYPE OF REPORT & PERIOD COVERED Study Project
7. AUTHOR(s) LTC Michael Tarman		6. PERFORMING ORG. REPORT NUMBER
9. PERFORMING ORGANIZATION NAME AND ADDRESS U. S. Army War College Carlisle Barracks, PA 17013		8. CONTRACT OR GRANT NUMBER(s)
11. CONTROLLING OFFICE NAME AND ADDRESS Same		10. PROGRAM ELEMENT, PROJECT, TASK AREA & WORK UNIT NUMBERS
14. MONITORING AGENCY NAME & ADDRESS (if different from Controlling Office)		12. REPORT DATE 3 Apr 89
		13. NUMBER OF PAGES 28
		15. SECURITY CLASS. (of this report) Unclas
		15a. DECLASSIFICATION/DOWNGRADING SCHEDULE
16. DISTRIBUTION STATEMENT (of this Report) Approved for public release; distribution is unlimited.		
17. DISTRIBUTION STATEMENT (of the abstract entered in Block 20, if different from Report)		
18. SUPPLEMENTARY NOTES		
19. KEY WORDS (Continue on reverse side if necessary and identify by block number)		
20. ABSTRACT (Continue on reverse side if necessary and identify by block number) See reverse		

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President Reagan's "Executive Order for a Drug Free Federal Workplace" required the head of each executive agency to establish a program to test for the use of illegal drugs by employees in sensitive positions. Chapter 5, AR 600-85, prescribes Army procedures and identifies those positions which are considered sensitive. This study examines the impact of the Executive Order's drug testing requirement on the U.S. Army. It discusses the background leading up to the issuance of the Executive Order. It summarizes implementation directives in support of the Executive Order and looks at who is considered eligible for drug testing. It concludes with some proposals for enhancing the drug testing program.

Keywords: drug abuse; military organizations; security; Drug testing program;

Random drug testing program; civilian personnel (KT)

USAWC MILITARY STUDIES PROGRAM PAPER

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RANDOM DRUG TESTING OF ARMY CIVILIAN EMPLOYEES

An Individual Study Project
Intended for Publication

by

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ABSTRACT

AUTHOR: Michael F. Tarman, LTC, MP

TITLE: Random Drug Testing of Army Civilian Employees

FORMAT: Individual Study Intended for Publication

DATE: 3 Apr 89 PAGES: 26 CLASSIFICATION: Unclassified

President Reagan's "Executive Order for a Drug Free Federal Workplace" required the head of each executive agency to establish a program to test for the use of illegal drugs by employees in sensitive positions. Chapter 5, AR 600-85, prescribes Army procedures and identifies those positions which are considered sensitive. This study examines the impact of the Executive Order's drug testing requirement on the U.S. Army. It discusses the background leading up to the issuance of the Executive Order. It summarizes implementation directives in support of the Executive Order and looks at who is considered eligible for drug testing. It concludes with some proposals for enhancing the drug testing program.

INTRODUCTION

On September 15, 1986, President Ronald Reagan issued Executive Order 12564 calling for a drug free Federal workplace. Each Federal agency was required to increase awareness and prevention of drug abuse; identify and rehabilitate illegal drug abusers; and improve the quality and accessibility of treatment services for employees. As part of the requirement to identify drug abusers, the President directed a drug testing program for employees in sensitive positions.

The current Army Alcohol and Drug Abuse Prevention and Control Program does not fully comply with the President's guidelines for random drug testing of civilian employees. Specifically, the Army has not directed testing of civilians in positions which allow access to information which is vital to our national security. To ensure our national security interest are properly protected, the Army needs to reevaluate the positions being tested.

This study examines the impact of the Executive Order's drug testing requirement on the U.S. Army. It discusses the background leading up to the issuance of the Executive Order. It summarizes implementation directives in support of the Executive Order and looks at who is considered

eligible for drug testing. It concludes with some proposals for enhancing the drug testing program.

The constitutionality of the Army's random civilian drug testing program is under challenge. On March 1, 1988, the National Federation of Federal Employees sought an injunction in the U.S. District Court for the District of Columbia against the random urinalysis drug testing of Department of the Army (DA) civilian employees. On July 6, 1988, District Judge Thomas P. Hogan permanently enjoined DA from random testing of civilian employees. This permanent injunction was stayed pending appeal by the Army. 1

Although the results of this appeal may impact on the current Army civilian drug testing program, this study project was undertaken with the assumption the final decision will be favorable to the Army and drug testing of certain employees for illegal drugs will be required as mandated by the Executive Order.

BACKGROUND

Perhaps no topic has created more controversy and public debate in recent years than has the issue of what to do about the growing drug problem. It is difficult to pick up a newspaper or watch a news broadcast on television without finding a story involving drug abuse or learning of

a new initiative to fight the flow of drugs. Local, county, state and federal agencies have joined the battle in a nation-wide "War on Drugs."

Public and political concern over drug abuse grew considerably in the summer of 1986 following the cocaine-related deaths of University of Maryland basketball star Len Bias and Cleveland Browns football player Don Rogers. As the issue gained political momentum, President Ronald Reagan and congressional leaders competed for credit in the race against drug abuse. The House got a head start in July when it began bipartisan work on what would eventually become the Anti-Drug Abuse Act of 1986. This bill, which would ultimately be signed into law on October 27, increased drug offense penalties and authorized fiscal year 1987 funds for enforcement, eradication, interdiction, education, treatment and rehabilitation efforts.

President Reagan responded to the House initiative on August 4, 1986, in a nationally televised speech in which he, together with his wife Nancy, called for public mobilization in support of a national strategy to eradicate drug abuse. He indicated during the speech that he fully supported efforts to fight drug abuse, but he made it clear that the administration would not, as the House was doing with its anti-drug bill, seek major new expenditures for the anti-drug campaign. He outlined plans to seek drug-free workplaces and schools, to improve drug treatment for

abusers, to increase international cooperation to eradicate drugs in source countries, to strengthen law enforcement and to expand public awareness. 2

President Reagan chose to emphasize drug testing in both the private and public sectors. To set the example, in early August, President Reagan, Vice President George Bush and several dozen presidential assistants had submitted to drug tests. On September 15, he released Executive Order 12564. President Reagan's justification for the Order was that "the Federal government, as the largest employer in the nation, should show the way through a program designed to offer a helping hand and, at the same time, demonstrate that drugs will not be tolerated in the Federal workplace." 3 He expected federal employees to refrain from the use of illegal drugs and said the use of illegal drugs by federal employees, whether on or off duty, was contrary to the efficiency of public service. Persons who use illegal drugs were considered to be unsuitable for Federal employment.

The President hoped to reduce the negative effects of drugs in the workplace while at the same time consider the rights of the employee, the general public and the government. Each executive agency's plan was to include:

- (1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;
- (2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation,

and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provisions for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis. 4

As part of the testing program, each agency head had to make a determination as to which employees were to be considered in sensitive positions and thereby warrant testing. The agency's mission, the employees' duties, and the potential for adverse impact on public health and safety or to national security were to be considered in determining who was to be tested. The order went on to provide guidelines for dismissal of employees who were found to have used illegal drugs and refused to obtain assistance from the Employee Assistance Program or did not refrain from future usage of illegal drugs.

On the surface, the plan to offer the Federal work force as an example appeared to be realistic and justified in scope. However, the proposed drug testing aspect of the order quickly became a highly emotional and controversial issue. Consequently, from its inception, Executive Order 12564 has received continuous court challenges. On September 16, the day after it was signed, the National Treasury Employees Union filed suit to block its

implementation, charging that testing violated the Fourth Amendment to the Constitution prohibiting unreasonable search and seizures. The National Federation of Federal Employees' attempt at getting a permanent injunction against random drug testing of civilian employees is one of latest court cases. Final action by the Supreme Court in this latter case is expected in the Spring of 1989.

Surely, President Reagan and his advisors anticipated these constitutional challenges to his drug testing provisions. So, why take such a bold initiative? Perhaps, the answer can best be found in the ineffectiveness of past government efforts to curb drug abuse. Since the 1960's, a large part of society has generally considered recreational drug use to be acceptable. Although the individual use of controlled substances remained illegal, some states enacted laws making individual drug use, for drugs such as marijuana, a misdemeanor. This move to lower penalties for individual use was largely necessitated by the need to reduce the burden on an overloaded criminal justice system. However, for many it was viewed as further evidence of the permissive attitude toward drugs which seemed to be permeating the very core of American morals.

The government had directed massive amounts of funds against the "supply side" of the drug problem with no noticeable effect. As an example, in Fiscal Year 1986, Federal expenditures on drug law enforcement made up 84

percent of the total drug budget of \$1.7 billion. 5

Despite these expenditures, the government seemed to be disturbingly inefficient at interdicting the illegal distribution of drugs. Drug abuse continued to rise.

This lack of success, coupled with the public's disenchantment over the growing drug problem, forced the government to take a different approach. Drug traffickers could not flourish without drug users. It was time to attack the "demand side." Drugs users needed to be put on notice that their actions were illegal and the President wanted the Federal government to show the way.

Drug testing certainly would appear to be an attractive initiative. After all, the Department of Defense (DoD) had been drug testing since the 1970's and, at least statistically, it had proven to be successful in reducing the amount of drug use by DoD uniformed personnel. In 1980, 27 percent of all military personnel indicated they had used some sort of illegal drug in the past 30 days. In 1982, overall drug use dropped to 19 percent. By 1985, this figure had dropped to less than nine percent. This is a 67 percent total reduction. 6 Of course, critics might argue that the higher quality of recruits during this period contributed even more than drug testing to the substantially lower drug use rates. Nevertheless, in spite of the potential controversy, these favorable statistics undoubtedly had some bearing on drug testing being included

as a key component of President Reagan's efforts to create a drug free workplace.

IMPLEMENTATION GUIDANCE

Executive Order 12564 required the Office of Personnel Management (OPM) to issue specific implementation guidance to Federal agencies. This guidance was to assist agencies in interpreting the Order. OPM published Federal Personnel Manual System letter 792-16, Subject: Establishing a Drug-Free Federal Workplace, on November 28, 1986. This letter reinforced that one of the purposes of the Executive Order was to place the nation's two million civilian employees in the forefront of the effort to eliminate illegal drugs from the workplace. The letter also reemphasized the President's position that "Federal workers have a right to a safe and secure workplace, and all American citizens, who daily depend on the work of the Federal government for their health, safety, and security, have a right to a reliable and productive civil service." 7

OPM's letter included directions for all Federal agencies to establish drug prevention programs that were humane, responsible and effective. It called for a program that included voluntary drug testing and, where appropriate, mandatory drug testing in sensitive positions. The heads of

agencies were again given the discretion to examine the nature of the agency's mission and its employees' duties in determining which sensitive positions would be subject to random drug testing. OPM also addressed mandatory disciplinary action. "While the removal of an employee confirmed to use illegal drugs is authorized under the Executive Order, removal from Federal service is required after a second determination that the employee uses illegal drugs." 8 This position certainly supported the President's contention that the ultimate responsibility for remaining drug-free rests with the employee.

The Secretary of Health and Human Services (HHS) published "Mandatory Guidelines for Federal Workplace Drug Testing" in the Federal Register on April 11, 1988. The HHS guidelines provide scientific and technical requirements for drug testing programs. It lists those drugs for which to test as well as providing specimen collection procedures. It also specifies minimum standards for laboratory certification and outlines quality assurance and quality control requirements.

DoD guidance was quick to follow. DoD Directive 1010.9, DoD Civilian Drug Abuse Testing Program, was published on August 23, 1988. This directive updated a previous version, dated April 8, 1985, which had established the DoD civilian drug testing program. The update complied with the President's Executive Order. Provisions of the

updated DoD drug testing program included employee privacy, confidentiality, employee assistance programs, and supervisory training. The DoD directive requires components to take disciplinary action against employees who use illegal drugs and provided the following discretionary disciplinary actions which might be taken consistent with the Civil Service Reform Act:

- (1) Reprimanding the employee in writing.
- (2) Suspending the employee for 14 days or less consistent with the procedural requirements in Title 5, Code of Federal Regulations.
- (3) Suspending the employee for 15 days or more consistent with the procedural requirements in Title 5, Code of Federal Regulations.
- (4) Suspending the employee, consistent with...Title 5, Code of Federal Regulations, until such time as he or she successfully completes counseling or rehabilitation or until the DoD Component determines that action other than suspension is more applicable to the individual situation.
- (5) Removing the employee from Federal service...for confirmed illicit use of an illegal drug; refusal to take a drug test authorized by E.O. 12564...; refusal to obtain or successfully complete counseling or rehabilitation as required by the (E.O.); or once having completed counseling or rehabilitation, failing to refrain from illegal drug use. 9

The DoD directive, like its OPM predecessor, requires elimination action against an employee who was found using illegal drugs a second time. It also provides for an employee who refuses to be tested to be subject to

the full range of disciplinary actions, including dismissal.

DA published its supporting procedures in Army Regulation 600-85, dated October 21, 1988. The AR states that the Army's civilian drug testing program has a three-prong focus. It helps determine if an individual is fit for employment in a position which has been designated for testing. It seeks to identify drug abusers and facilitate their enrollment in counseling, rehabilitation and medical treatment programs. It also seeks to strengthen national security by identifying those persons whose drug use could cause disruption in operations, loss or destruction of property, threats to safety for themselves or others, or the potential for blackmail leading to the unauthorized disclosure of classified information. 10

The Army's regulation provides specific administrative guidance. Job descriptions for those positions identified as meeting the drug testing guidelines will be specifically coded as such. Persons applying for or employees currently in those positions will be informed that they may be given random testing for illegal drug usage before being selected for the position or periodically after selection. If a person tests positive for illegal drug use or refuses to be tested, that person will be denied further employment in that position. Upon removal from a test designated position, that person will be reassigned to a non-critical position. In those cases where no non-critical positions

exist for which the employee is qualified, the employee will be separated from the service. 11

Although both the DoD and Army programs emphasize the need for employees in specific jobs to remain drug free, the two differ in their approaches to disciplinary action. Whereas the DoD directive requires disciplinary action in certain cases, the Army civilian drug testing program emphasizes non-disciplinary procedures to provide the employee rehabilitation. A person who has tested positive will only be separated from the service when no other position exists for which the employee is qualified. The only other times adverse action will be taken against an employee is when that employee refuses rehabilitation assistance or fails to successfully complete rehabilitation. 12

AR 600-85 further complies with HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs. It provides guidance to managers on procedures to be implemented to insure proper collection, custody and control of specimens. It emphasizes the individual's privacy during the urine collection process and in cases of positive test results. The regulation goes into great detail on collection site procedures to be followed to ensure urine samples do not become tainted. It provides reporting requirements and information on treatment programs. It authorizes medical review officers to order a reanalysis of

the original sample should any question arise as to the validity or accuracy of a positive test result. It also identifies those positions that DA considers to warrant drug testing.

TESTING DESIGNATED POSITIONS

Executive Order 12564 requires agencies to test personnel in sensitive positions. The Order defines sensitive positions as those which had either been designated special-sensitive, critical-sensitive, or noncritical-sensitive under the Federal Personnel Manual or which allow access to classified information. ¹³ Each civilian position within DoD is required to be categorized with respect to security sensitivity. A position that has been designated sensitive requires a security clearance of some type. The DoD directive expanded the definition of sensitive positions to include:

- (1) Individuals serving under Presidential appointments.
- (2) Law enforcement officers as defined by (Chapter 5, United States Code).
- (3) Other positions that the DoD Component Head determines to involve law enforcement, U.S. national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence. ¹⁴

As previously mentioned, each agency head was to examine the nature of its mission and its employees' duties

in determining which sensitive positions would be subject to random drug testing. Those positions designated for random drug testing are called testing designated positions. The DoD directive specifies that "(a)ll positions that require that the incumbent possess a security clearance of top secret or higher may be designated for testing." 15 The Army elected not to include everyone with a top secret clearance. It restricted testing designated positions to law enforcement personnel, personnel involved with aviation, persons in chemical and nuclear positions, and drug and alcohol staff personnel. A complete list is as follows:

- (1) Air traffic control specialist
- (2) Pilots
- (3) Aircraft engine mechanics
- (4) Aircraft transmission mechanics
- (5) Prop and rotor mechanic
- (6) Aircraft mechanics
- (7) Aircraft attendants
- (8) Guards
- (9) Police officers
- (10) Criminal investigators
- (11) Correctional administrators
- (12) Chemical and nuclear surety positions
- (13) Alcohol and Drug Abuse Prevention and Control Program direct service staff personnel
- (14) All employees at Army forensic drug testing laboratories 16

Under current guidelines, the total number of employees covered by the program is approximately 10,000.

Undoubtedly, many commanders would argue other positions warrant being designated for testing. However, before any other position may be included in the drug testing program, the prior approval of the Major Command (MACOM), DA and DoD

is required. MACOM or Installation commanders desiring a certain position to be identified for inclusion in the drug testing program must submit a formal request to DA. 17

It is too early to be able to evaluate the results of the Army's revised civilian employee drug testing program. However, the same type positions were tested under the previous edition of AR 600-85; therefore, an examination of the results of testing conducted under the provisions of the 1986 regulation will provide some indications of what type positive rates may be anticipated. During a 21 month period, from October 1, 1986, to June 30, 1988, 15,732 drug test were given to employees in critical positions. Only 94, or 0.59 percent, of those tested were positive. The number of positives for new personnel applying for critical positions ran slightly higher, yet still less than one percent. There were 24 positives out of a total of 2529 accession tests, a positive rate of 0.94 percent. 18

With such low positive rates and the forecast for a reduced budget, some may suggest elimination of random drug testing. However, as long as the United States has a drug problem, it is apparent that random drug testing will play an intricate role in the government's war on drugs. Just this past November, Transportation Secretary James H. Bunnley IV ordered transportation workers, ranging from commercial airline pilots to truckers, to participate in a drug testing program. Even more recently, President George

Bush was reportedly displeased with a suit challenging random drug testing of White House complex employees because the government must ensure a clean workplace. 19 This support, coupled with his inaugurational pledge to eliminate illegal drugs from our society, would seem to allow for the assumption that the President will continue to support random drug testing throughout the Federal government. It has proven effective in reducing illegal drug abuse. Unless it is determined to be unconstitutional, it is here to stay. As the Army continues to pursue actions to reduce the demand for illegal drugs, it should change its program to comply with the Executive Order and consider improvements to the civilian drug testing program.

CONCLUSION

The Army's regulation on random civilian drug testing does not comply with the Presidential Executive Order and DoD direction on testing persons in national security positions. The Executive Order emphasizes that anyone with access to classified information should be considered for testing. The DoD directive, even though slightly more restrictive than the Executive Order, still states that any position which requires a top secret clearance may be designated for testing. Clearly, the intent of the President and DoD was to consider random testing for persons

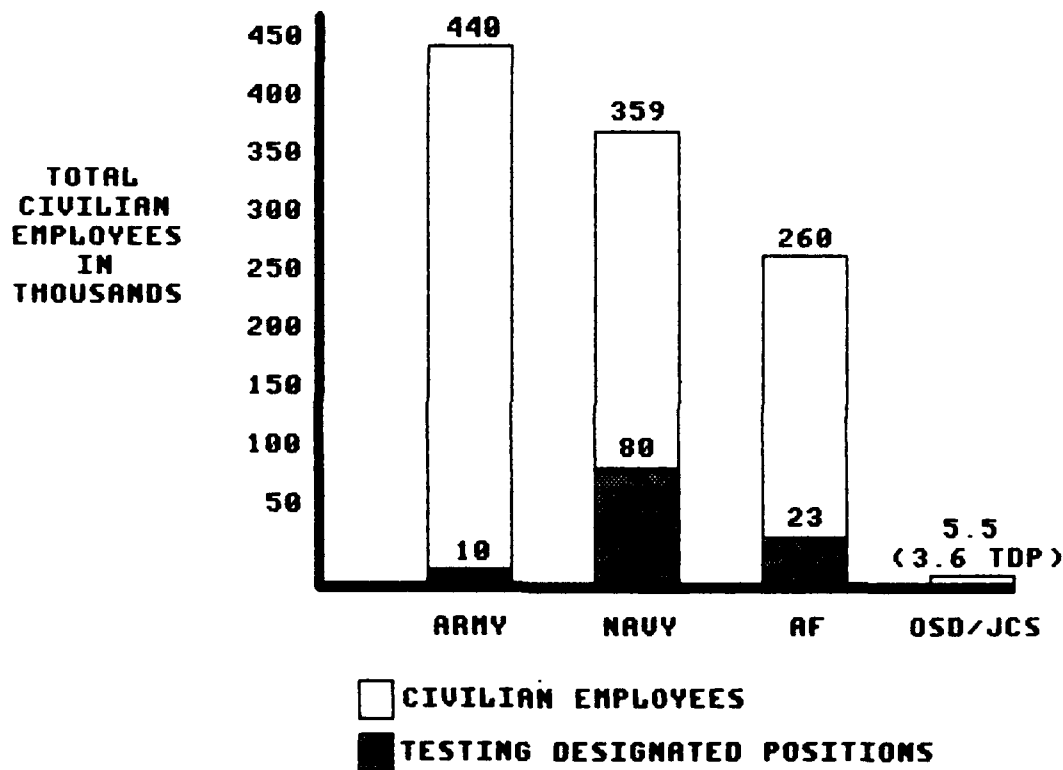
with access to vital national security information. The decision by the Army not to test anyone based on access to classified information violates this intent. Additionally, this failure to include national security positions is a direct contradiction of one of the program objectives listed in AR 600-85.

According to an official from the Alcohol and Drug Policy Branch, Office of the Deputy Chief of Staff for Personnel, the Army's decision to restrict testing to positions based on public safety considerations was deliberate. It was felt that the public safety issue would have a better chance of surviving any court challenges standing alone. 20 Therefore, so as to not jeopardize the program, no positions were designated for testing based solely on the requirement that the incumbent might have access to classified information the disclosure of which could seriously impair national defense.

The other services' selections of TDP positions are more in compliance with the DoD guidance. The Air Force includes personnel in special access programs and those with access to sensitive compartmented information in their testing program. The Navy has elected to test everyone with a security clearance. The Office of the Secretary of Defense and the Joint Chiefs of Staff (OSD/JCS) is testing everyone in a sensitive position. Percentage wise, the Army is testing slightly over two percent of its civilians; the

Air Force, nine percent; the Navy, approximately 22 percent; and OSD/JCS, 65 percent. 21

The following chart graphically depicts the number of TDP positions within the total civilian workforce, by service.



PROPOSED ENHANCEMENTS

There are two actions which should be taken to enhance the civilian drug testing program. These two actions are designating some national security positions for inclusion in the program and undertaking educational programs to

nurture civilian employee support for the program. A more detailed examination of each proposal follows.

As mentioned earlier, the decision by the Army to exclude national security positions from the testing program was largely based on a desire to have a program considered

to have the best likelihood of withstanding a court challenge. The Army should expand its random drug testing program to include positions with access to sensitive national security information. For example, serious consideration should be given to including personnel being considered for or assigned to a Special Access Program (SAP) or a Sensitive Compartmented Information (SCI) program. Both programs involve sensitive national security information. A SAP is an especially sensitive Army program involving military research and development, commodities or operations. The Secretary of Defense must approve all SAPs. SCI programs are classified such because of the sensitivity and importance of the sources and methods of intelligence collection systems. Access to both programs is closely controlled and constantly reviewed.

Incidentally, a spokesman responsible for SAP policy indicated that a request to DA for those positions to become TDP will be submitted in the summer of 1989. 22

Although drug abuse by persons in public safety positions may have a more immediate impact, the potential for damage to the public is no less diminished by drug abuse

by persons in SAP and SCI programs. Certainly, persons in these programs who illegally use drugs run an added risk of being blackmailed. The loss of sensitive information from these programs to a potential adversary can translate to just as many, if not more, deaths on tomorrow's battlefield as would result from a helicopter that crashed because its drug-impaired mechanic failed to tighten a rotor nut. In fact, although there have been no known cases documented to date, a strong argument could be made that the loss of highly sensitive technical information possesses the potential for far-reaching adverse impact on national security.

Including SAP and SCI personnel in the random drug testing would have no adverse impact on the Army's laboratory testing procedures. The prescribed frequency of random drug testing is the prerogative of the commander. AR 600-85 indicates that commanders must decide whether the civilian or military segment of the population is more at risk and manage drug testing quotas accordingly. Civilians applying for positions that have been designated for testing must receive a preassessment test; beyond that, subsequent testing is left to the commander's discretion. 23 The exact number of personnel in the two programs is classified; however, the number of additional preassessment test would not exceed the capabilities of the Army's two contract laboratories. The only additional resources required would

be \$22.56 per additional test. 24

Another aspect of random drug testing which the Army must address is education. Not just educating the civilian work force on the devastating impact of illegal drug use, but a program designed to educate them on the positive aspects of the drug testing program. It is an area that has heretofore been woefully neglected. The Army needs to undertake an effort to determine the attitudes of its employees toward the random drug testing program and develop educational programs to nurture employee support for the current program.

The American public in general is convinced that drug testing in the workplace is the most effective way of reducing illegal drug use. While some workers in the civilian sector have mixed feelings about whether or not drug testing violates their rights, the majority are willing to be tested and would like to see athletes and those in jobs involving safety tested. 25 Presumably, this desire to see athletes tested is related to the impact athletes have on the attitudes of youth.

Such is probably not the case in the military. DA officials indicate one often-heard complaint is concern over the reliability of test results. 26 Such concern is not surprising after all the adverse press the Army received in 1984 over the mishandling of urine samples. Consequently, an overall negative response might be anticipated if the

Army's civilian employees were surveyed on their attitudes toward drug testing.

However, since Army civilian employees have not been surveyed, any speculation on their attitudes toward the random drug testing program is just that - speculation. The Army needs a world-wide survey of its civilian employees to identify those areas which are having negative impact on work force support for the program. Such a survey would be costly, but the results would allow the Army to initiate appropriate actions to alleviate employee discontent.

If for example, as expected, the survey reveals employees are concerned over the reliability of drug testing, programs which educate employees on testing procedures need to be developed. Employees need to learn drug testing is virtually 100 percent reliable when done by competent lab personnel. They need to be informed of custody procedures so they will feel comfortable that the potential for tampering with samples is near impossible. On the other hand, the Army needs to know if the majority of employees agree that illegal drug use is contrary to the efficiency of public service and are willing to be tested.

An expanded awareness of the problems associated with on-duty illegal drug use will increase support for the Army's program. The more DA civilians know and understand about random drug testing the less they will find it offensive and the more they will favor its use. Through

education programs the civilian worker will become an intricate component of the effort to eradicate drugs from the workplace.

SUMMARY

Drug abuse by civilian employees has serious impact on national security by reducing the total force effectiveness. Executive Order 12564 added impetus to an already existing Army civilian drug testing program. Illegal drug abuse can no longer be tolerated. Although drug testing possesses the potential for being viewed as unreasonably obtrusive, it has proven to be highly effective in reducing the incidents of drug abuse. Commanders, at all levels, should become intimately familiar with the provisions of the drug testing program. Drug testing can deter and detect drug use. It can help identify persons with drug problems who need rehabilitative assistance. If not administered properly, morale and productivity of an organization can be effected. Commanders must genuinely demonstrate that the overall purpose of the drug program is to identify and help persons with a drug problem. Drug testing should be treated as a valuable management tool to increase productivity, not a threatening hammer to be held over a fearful work force.

The Army can assist commanders by expanding the testing program to include sensitive national security positions and

enhancing civilian education programs. The elimination of illegal drugs from the Army's civilian work force will pay untold dividends that can not be measured in dollars and cents. The "war on drugs" can be won. It will not be easy and it will not happen over night. More importantly, it will not be won without an effective random drug testing program.

ENDNOTES

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12 Ibid., p. 24.

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16 AR 600-85, p. 26.

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20 Dr. Donna Smith Interview.

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