

DEPARTMENT OF ENERGY

10 CFR Part 710

RIN 1992-AA13

Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Significant Quantities of Special Nuclear Material

AGENCY: Office of Safeguards and Security, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is amending its regulations regarding access to classified matter and special nuclear material which establish the Personnel Security Assurance Program (PSAP). The PSAP was created to assure the reliability of individuals in certain positions, referred to as PSAP positions for purposes of this rule. The Department now amends this rule to include references to the drug testing protocols used in the PSAP and to reflect the Government-wide requirements for a standard background investigation. This change will reduce the scope of the background investigation for the PSAP, and thereby reduce cost and intrusiveness.

EFFECTIVE DATE: May 25, 1995.

FOR FURTHER INFORMATION CONTACT: Lynn Gebrowsky, Personnel Security Policy Branch, Office of Safeguards and Security, Office of Security Affairs, Department of Energy, (301) 903-3200, or Stephen P. Smith, Office of the Assistant General Counsel for General Law, Office of the General Counsel, Department of Energy, (202) 586-8618.

SUPPLEMENTARY INFORMATION:**I. General**

A proposed rule to amend 10 CFR part 710, subpart B, by the addition of certain drug and alcohol testing provisions, was published in the **Federal Register** on March 8, 1991 (56 FR 10075). Comments received in response to that publication are discussed in this final rule.

Four written comments were received on the proposed rule. Most of the comments concerned the provision in the proposed rule for alcohol testing in cases of occurrence or reasonable suspicion. This provision has been removed from the final rule pending a government-wide decision on the subject of alcohol testing. In consequence, none of the comments received in reference to alcohol testing will be addressed at this time.

The detailed drug testing protocols put forward in the proposed rule have been removed as a consequence of the

publication of 10 CFR part 707, "Workplace Substance Abuse Programs at DOE Sites," (57 FR 32652) which established those protocols for all drug testing conducted on contractor populations at sites operated under the authority of the Atomic Energy Act of 1954, as amended. The drug testing requirements set out in 10 CFR part 707 serve as the drug testing element for contractors in the PSAP. Drug testing procedures for Federal employees in the PSAP are found in Departmental directives.

One commenter felt that the most recent body of case law in the area of drug and alcohol testing for occurrence and reasonable suspicion had not been examined carefully in its applicability to the PSAP. DOE responds that it is difficult to anticipate the development of the law in such a relatively new field as drug testing, but the relevant case law has been adequately taken into account. The judicial examination of the issues surrounding drug testing has increased greatly over the past 5 years, stimulated by the growing realization of the safety, security, and performance threats represented by employee drug use. Further growth accompanied the issuance of Executive Order 12564 and the concomitant expansion of private sector testing programs.

The threshold issues of constitutionality, with particular reference to the Fourth Amendment, have been thoroughly discussed by the courts. The cases now generally have moved on to matters of detail in the actual conduct of the tests, which have been determined to be constitutionally permissible under the proper circumstances. Throughout the time that this rule (and 10 CFR part 707, which now promulgates the drug testing procedures) has been under development, DOE has been in contact with other Federal agencies having a responsibility for oversight of drug testing procedures. The Department is confident that this rule, relying upon the provisions of 10 CFR part 707 and DOE policies implementing Executive Order 12564, will bear scrutiny under the presently existing case law.

That commenter also expressed uneasiness over the evaluation of "applicants" under the PSAP. No evaluation, other than that which might be understood by drug testing, is addressed in this rule. However, in the proposed rule of March 8, 1991, the issue was considered and the phrase "tentatively selected applicants" employed to narrow the requirement for evaluation from all applicants to those selected for the job but not yet performing the duties of the job.

More specific and detailed comments are addressed below.

II. Comments Received and DOE Responses**A. Americans With Disabilities Act of 1990**

One commenter stressed that any assessments of individuals under the PSAP need to be consistent with the Americans with Disabilities Act (ADA), which took effect July 26, 1992. Under this act, reasonable accommodation must be afforded individuals with disabilities who are "otherwise qualified" for the job. An individual with a disability is defined as one who has a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or who is regarded as having such an impairment. In order to be considered "otherwise qualified," a person must be able to meet all of a program's requirements in spite of his handicap. *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).

The overriding qualifications for a PSAP position are trustworthiness, reliability and sound judgment (see subpart A of part 710). All evaluations under PSAP are directed toward that determination. The U.S. Court of Appeals for the Second Circuit has held that having poor judgment and exhibiting irresponsible behavior, while it may disqualify an applicant from a job, is not such a substantial limitation in a major life activity that it qualifies as a handicap under the Rehabilitation Act. *Daley v. Koch*, 892 F.2d 212 (2d Cir., 1989).

It is certainly possible for an individual with a disability, either physical or mental, to hold a PSAP position, provided the individual meets the requirements of the program. Current illegal drug users and alcoholics who cannot safely perform their jobs are not protected by the ADA.

B. Guidelines of the Department of Health and Human Services

It was suggested that the PSAP rule (and, by inference, the Workplace Substance Abuse rule, which provides the drug testing procedures for the PSAP) could not impose the "Mandatory Guidelines for Federal Workplace Drug Testing Programs," issued by the Department of Health and Human Services (HHS), on contractors without further clarification from the DOE. This concern resulted from an apparent misinterpretation of references to the HHS Guidelines in the proposed rule. Those references were specific and