

 Drug and Alcohol Testing Policy State of Tennessee Department of Environment and Conservation	Policy Directive: POD-002 Effective Date: 12/23/2022
Approved By:  David W. Salyers, P.E. Commissioner	First Issue Date: 12/23/2022 Review/Revised: 12/21/2023
SUBJECT: Procedures and standards for drug and alcohol testing of Department personnel and certain prospective Department employees	

I. RESPONSIBLE OFFICE:

The Department of Environment and Conservation (“Department”), Division of People and Organizational Development (POD) is responsible for overseeing this Drug and Alcohol Testing Policy (“Policy”).

II. PURPOSE:

The purpose of this Policy is to promote a workplace free of drug abuse and alcohol misuse, maximizing safety, efficiency, and morale by testing employees and certain prospective employees for drugs and alcohol under appropriate circumstances.

III. DISCLAIMER:

This Policy is a basis for internal administrative review and guidance only. It is not intended to, does not, and may not be relied upon to create any substantive or procedural rights. If any portion of this Policy conflicts with applicable state or federal laws or regulations, that portion shall be considered void. The remainder of this Policy shall remain in full force and effect.

IV. SCOPE:

This Policy applies to all Department employees and certain prospective Department employees as set forth below. Employees with a commercial driver’s license (CDL) are subject to this Policy as well as Policy Directive POD-P-001-CDL Testing 020120, as circumstances may dictate. This Policy works in conjunction with the Department’s Drug-Free Workplace Policy.

V. AUTHORITY:

21 U.S.C. § 812
Tennessee Code Annotated § 4-4-103
Tennessee Code Annotated § 50-9-101 et seq.

Tennessee Comprehensive Rules and Regulations 1120-10-.03(22)
Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989)
Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989)
Knox Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ., 158 F.3d 361 (6th Cir. 1998)

VI. DEFINITIONS:

- a) **Alcohol:** The intoxicating agent in beverage alcohol, ethyl alcohol, or other low-molecular-weight alcohols including methyl and isopropyl alcohol.
- b) **Controlled Substance:** Any drug listed in 21 U.S.C. § 812 and other federal regulations. Generally, these are drugs which have a high potential for abuse. Such drugs include, but are not limited to, heroin, marijuana, cocaine (including crack), and PCP. They also include legal drugs that are not prescribed to an employee or that are not legally obtained. Legally obtained and properly used prescribed substances are not considered controlled substances under this Policy, even if they contain a substance that would be illegal if not prescribed.
- c) **Critical Incident:**
 - 1) An incident causing a person's or animal's death;
 - 2) An incident injuring a person who, as a result, immediately receives medical treatment away from the scene of the incident;
 - 3) A motor vehicle accident where one of the vehicles is towed from the scene of the accident;
 - 4) An incident that results in an employee driver being issued a citation; or
 - 5) A law enforcement use of force.
- d) **Drug:** Any controlled substance or prescription or over-the-counter medication.
- e) **Drug Abuse:** Any use of a drug in an illegal manner or other than as intended by the manufacturer or prescribed.
- f) **Employee Assistance Program (EAP):** The State of Tennessee's mental health program available to all benefits-eligible employees and their eligible family members, even if they are not enrolled in medical insurance.
- g) **Medical Review Officer (MRO):** A licensed physician (medical doctor or doctor of osteopathy) with knowledge of substance abuse disorders and with medical training to interpret and evaluate an individual's confirmed positive test result, together with the individual's medical history and any other relevant biomedical information. The MRO is responsible for receiving laboratory results that an employer's drug testing program generates.
- h) **Reasonable Suspicion:** A belief based upon specific, articulable, and objective grounds that an employee has or is abusing drugs or misusing alcohol.
- i) **Refuse to submit to an alcohol or drug test:** When an employee:

- 1) Fails to show up for any test within a reasonable time after being directed to do so by the Department;
 - 2) Fails to remain at the testing site until the testing process is complete;
 - 3) Fails to provide a urine, breath, or saliva specimen for any drug test or alcohol test;
 - 4) Fails to permit the observation or monitoring of the provision of a specimen for an in-person or oral test;
 - 5) Fails to provide a sufficient amount of urine, breath, or saliva when directed, unless it has been determined, through a required medical evaluation, that there was an adequate medical explanation for the failure;
 - 6) Fails or declines to take a second test the Department has directed following a negative dilute result;
 - 7) Fails to cooperate with (e.g. refuses to empty pockets when directed by the collector, behaves in a confrontational way that disrupts the collection process, fails to wash hands after being directed to do so by the collector) or otherwise interferes with any part of the testing process;
 - 8) Fails to sign the certification at Step 2 of the alcohol testing form (ATF);
 - 9) Has a verified adulterated or substituted test result, according to the MRO's report;
 - 10) Fails to follow the observer's instructions for an observed collection;
 - 11) Possesses or wears a prosthetic or other device that could be used to interfere with the collection process; or
 - 12) Adulterates, substitutes, or otherwise tampers with the specimen.
- j) **Safety-sensitive function:** A job function in which an impairment constitutes an immediate and direct threat to public health or safety, such as a function that requires the employee to carry a firearm, perform law-enforcement functions, perform life-saving procedures, work with controlled substances, or a function in which a momentary lapse in attention could result in injury or death to another person.

VII. POLICY:

Employees shall work free of impaired judgment or impaired physical ability to prevent injury to themselves, other employees, and the public. The Department has a zero-tolerance policy for alcohol use on the job and drug abuse. New hires will be given this Policy to read and acknowledge.

As a condition of employment or continued employment, an employee will not:

- a) Use, possess, trade, sell, offer for sale, or offer to buy controlled substances, including prescription drugs that are not legally obtained or used, on or off the job;

- b) Work or report to work impaired or while having controlled substances in any detectable amount in the employee's body, blood, or urine;
- c) Work or report to work under the influence of alcohol; or
- d) Tamper with a test administered under this Policy.

VIII. TESTING STANDARDS AND PROCEDURES:

POD maintains contact information for the Department's contracted testing provider. POD will designate the oral swab testing kit to be used by those divisions within the Department that elect to acquire and use these oral swab test kits.

Types of testing

All employees and prospective employees seeking safety-sensitive positions will be subject to the following types of drug and alcohol testing, as circumstances require:

a) Pre-Employment Testing

Before an offer of employment may be extended to any prospective Department employee seeking a safety-sensitive position, that prospective employee must test negative for alcohol and controlled substances per the policy below. Testing shall be conducted at the Department's expense. All references below to an employee, in the context of testing, shall include, as applicable, a prospective employee seeking a safety-sensitive position.

If a prospective employee tests positive for alcohol or controlled substances, the prospective employee shall not be eligible for employment with the Department.

All job postings for safety-sensitive positions shall contain notice of the pre-employment testing requirement.

b) Critical-Incident Testing

Within the Department's discretion, any employee engaged in pay status will be required to submit to drug and alcohol testing following a critical incident in addition to any tests that investigating law enforcement agencies require.

Except as otherwise provided in this Policy, a supervisor or the supervisor's designee must transport an employee to any designated collection site or oversee an oral swab test as set forth below, preferably within two hours after a critical incident (but in no case more than eight hours), for alcohol testing, and within 32 hours of the critical incident for drug testing. The Department will bear the cost of the test.

Employees subject to critical-incident testing must refrain from using alcohol for eight hours following the incident or until completing a post-incident alcohol test, whichever comes first. The employee must remain available to submit to critical-incident testing following an incident or the employee may be deemed to have refused the test. Any employee who refuses to submit to an alcohol or drug test is in violation of this Policy. Any

such violation will be considered a positive test result for drugs or alcohol and will result in discipline up to and including separation.

Testing should not take precedence over the employee's need for medical treatment or public safety considerations at the scene.

If law enforcement officials conduct an alcohol or drug test on an employee involved in a critical incident and those test results are available to the Department, those results may meet critical-incident testing requirements.

c) Reasonable-Suspicion Testing

A supervisor must direct reasonable-suspicion testing for alcohol or drugs for any employee reasonably suspected of abusing drugs or reporting to work under the influence of alcohol. If reasonable suspicion exists, the employee's supervisor will meet with the employee to explain the observations giving rise to reasonable suspicion and the requirement to undergo a drug or alcohol test, or both, as soon as possible following the observations.

The person with reasonable suspicion of an employee's alcohol use during work hours or drug abuse must document in writing, within 24 hours of the observation, the specific, articulable, and objective grounds that support the reasonable suspicion using the reasonable-suspicion testing checklist (Appendix). If the person with reasonable suspicion is not the employee's supervisor, the person must inform the employee's supervisor of the observation as soon as possible and provide the checklist.

Reasonable suspicion is more than a "hunch" or a "gut feeling." Some examples of specific, articulable, and objective grounds include, but are not limited to:

- 1) Observable phenomena, such as direct observation of drug or alcohol use or possession or the physical manifestations of being under the influence of a drug or alcohol, including but not limited to: odors (smell of alcohol, body odor, or urine); movements (unsteady, fidgety, dizzy); eyes (dilated, constricted or watery eyes, or involuntary eye movement); speech (slurred, slow, distracted mid-thought, inability to verbalize); emotions (argumentative, agitated, irritable, drowsy); actions (yawning, twitching); and inactions (sleeping, unconscious, no reaction to questions);
- 2) A pattern of abnormal, erratic, or inappropriate behavior;
- 3) The identification of an employee as a suspect in a criminal investigation involving drug possession, use, distribution, or sale;
- 4) Information provided by reliable and credible sources or sources whose information has been independently corroborated; or
- 5) Newly discovered information indicating that the employee may have tampered with a previous drug or alcohol test.

Referral

The supervisor of an employee to be tested will make a referral for testing. For reasonable-suspicion testing based on specific, articulable, objective grounds, the supervisor must document the grounds using the checklist and verify that the grounds reasonably justify testing with a member of the Chief Ranger's Office (for employees of the Bureau of Conservation), POD, or the Department's Office of General Counsel before making such referral for testing.

Testing

Refusal to submit to an alcohol or drug test when required under this Policy is considered the same as a positive test result. Testing may be either at a drug testing facility or by oral swab at the employment site.

If a drug testing facility is utilized, the employee's supervisor must, as soon as possible after the observations triggering the request to test, remove the employee from duty and that supervisor or a designee must transport the employee to the collection site.

Alternatively, where available, oral swab testing may be utilized at the employment site, as soon as possible after the observations triggering the request to test. When utilizing the swab test, the employee will be required to swab their mouth, per the testing kit's instructions, with two witnesses present, one of whom should be the employee's supervisor or designee. The supervisor or designee will then ensure that the test is properly packaged and sent for evaluation per the testing kit's instructions. As soon as possible following the test, the supervisor or designee will document the administering of the test in a written memorandum, to include (1) the identity of the employee; (2) the observations giving rise to the test; (3) the location of the test; (4) the time and date of the test; (5) the brand of the test; (6) the procedures followed in administering the test and sending the results for testing; and (7) the identity of the witnesses to the test. This memorandum will be given to POD for storage.

The employee will be placed on administrative leave pending the results of either form of testing. The Department will bear the cost of testing. The decision of which form of testing to employ is at the discretion of the supervisor.

If an alcohol test based on reasonable suspicion is not administered within two hours following the observations triggering the referral to test, the supervisor must make and maintain a written record stating why the alcohol test was not timely performed. If the test is not conducted within eight hours of the observations triggering the referral to test, attempts to administer the test must cease, and the supervisor shall indicate in the record the reason the test was not timely completed. If the alcohol test is not conducted within eight hours, the employee must remain off duty for 24 hours following the observations triggering the referral.

For reasonable suspicion drug testing, a supervisor or a designee must transport the employee to the collection site or administer an oral swab test at the employment site as soon as possible after the observations triggering the request to test.

Any employee who is off duty to undergo testing may use administrative leave for the duration of the test and time spent awaiting test results. Otherwise, any employee following the procedures outlined in this Policy will be required to use the employee's accumulated annual or sick leave or leave without pay (LWOP), if necessary.

Notification of Results

Upon receipt of a positive result for alcohol or a controlled substance (including improper usage of legal drugs), POD will notify the employee's supervisor to initiate mandatory disciplinary procedures. Employees who test positive for legally prescribed drugs may be asked to submit to a fitness-for-duty examination, return-to-duty examination, or further investigation, at the Department's discretion.

Contesting Results

An employee who receives a positive confirmed test result may contest or explain the result to the MRO within 72 hours after receiving written notification of the test result. If an employee's explanation or challenge is unsatisfactory to the MRO, the MRO shall report a positive test result back to the Department. An employee may contest the drug or alcohol test result pursuant to rules adopted by the Department of Labor and Workforce Development.

Return-to-Duty and Follow-Up Testing

Upon receipt of a positive result for alcohol or a controlled substance (including improper usage of legal drug) from either form of testing, the employee will be advised of the results and will be removed from duty, precluded from returning, and referred to the EAP, which will include assessment by a substance abuse professional. The employee must contact the EAP within five business days of being notified of a positive result. The employee may use sick leave or accrued annual leave to participate in the EAP. If the employee lacks sufficient accrued leave, the time away from work is considered LWOP.

Employees must participate in any conditions the EAP identifies. An employee who violates these conditions will be subject to further corrective action, up to and including separation.

Once the EAP has developed the treatment plan, the employee may use any available leave, including sick leave, for participation in the treatment plan. If the employee lacks sufficient accrued leave, the time away from work is considered LWOP.

- a) Before consideration for return to work, the employee must:
 - 1) Comply with and agree to continue in treatment the EAP recommends; and

- 2) Produce a negative return-to-duty test result.
- b) The supervisor or the supervisor's designee must accompany employees to the testing site immediately when it is time for them submit to a follow-up test. Without accrued annual leave or sick leave, the employee's time away from work to participate in return-to-duty testing and follow-up testing is considered LWOP. Alternatively, the supervisor and another witness may oversee an oral swab test, administered according to the procedures outlined above.
- c) The Department will bear the cost of collecting and processing Department-directed follow-up tests. The employee will bear the cost of counseling and treatment. The employee will provide the employee's own transportation for counseling and treatment.

Producing a positive follow-up test is considered a second violation of the Policy and will result in separation from service.

Self-Referred Counseling and Rehabilitation

Sometimes, alcohol use and drug abuse result from chemical dependency that substance abuse professionals can successfully treat. Employees experiencing problems with alcohol or drug use should seek voluntary counseling and treatment. It is the employee's responsibility to seek help when needed before substance abuse causes problems on the job or results in disciplinary action.

Communication encouraging employees to contact the EAP should include contact information for EAP and language that an employee may participate in the EAP without jeopardizing the employee's employment status. However, voluntary participation in EAP does not preclude disciplinary action for violating this policy.

Employees who self-refer for counselling or rehabilitation for alcohol use or drug abuse are not subject to the referral and testing requirements listed in this Policy, provided that:

- a) The employee does not self-identify in order to avoid testing;
- b) The employee makes the admission of alcohol use or drug abuse before performing a safety-sensitive function for the workday; and
- c) The employee does not perform a safety-sensitive function until the Department is satisfied that the employee has successfully completed education or treatment requirements arising from counseling or rehabilitation.

The Department will:

- a) Refrain from taking adverse action against an employee making a voluntary referral for alcohol use or drug abuse, provided that the admission occurs before the employee has been subject to testing, disciplinary action, or the use or abuse has affected job performance;

- b) Allow the employee sufficient opportunity to seek an evaluation, education, or treatment to establish control over the employee's drug or alcohol problem;
- c) Permit the employee to return to work only upon successful completion of a treatment program and as determined by an EAP provider; and
- d) Require a negative alcohol and/or drug test result before return to work.

The employee may use any available leave, including sick leave, for participation in self-referred counseling and rehabilitation. If the employee lacks sufficient accrued leave, the time away from work is considered LWOP. The employee bears the cost of counseling outside of that paid for through the EAP program. The employee will provide his or her own transportation for counseling and treatment.

Self-Reporting Prescribed Medication

An employee with a CDL who voluntarily self-reports prescribed medications for approval and who is approved to perform non-CDL-related duty may remain on non-CDL-related duty.

Record Storage and Confidentiality

POD will maintain information and records relating to alcohol or drug testing and EAP referrals for alcohol and drugs for two years from the date of the making of the record or personnel action involved, whichever occurs later, and will keep the information and records confidential to the extent required by law. The information and records will be maintained in secure files separate from general personnel files and will only be accessed and disclosed on a need-to-know basis or if relevant to a formal proceeding.

IX. DISCIPLINE:

The Department will take appropriate disciplinary action, up to and including separation, for those employees and employee supervisors or designees who violate this Policy.

Any employee who has a verified positive drug or alcohol test, including a test result deemed to be positive due to refusal to submit to an alcohol or drug test, will be subject to the following disciplinary actions:

- a) First offense:
 - 1) A minimum five-day suspension without pay.
 - 2) Completion of a mandatory EAP recommendation for treatment. Employees assigned to EAP must ensure the EAP representative is communicating the employee's treatment compliance to the employee's supervisor.

Any employee on initial probation with the Department will be dismissed from State service based on the first offense of a verified positive test.

- b) Second offense: Immediate separation from service.

Supervisors are responsible for ensuring an employee's compliance with all parts of this Policy. Any supervisor or designee who compromises the integrity of this Policy or who fails to enforce it shall be subject to disciplinary action up to and including separation, in the Department's discretion.

Arrests and Criminal Convictions

- a) As a condition of continued employment, an employee who is arrested for, charged with, or convicted of any criminal drug- or alcohol-related offense must notify the employee's supervisor no later than 24 hours after such arrest, charge, or conviction.
- b) If an employee is convicted of any criminal offense involving possession or unlawful use of drugs or alcohol, the employee is subject to disciplinary action up to or including termination. A conviction is a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the federal or state criminal drug statutes.
- c) If an employee participating in an activity funded by a federal agency is convicted of violating any criminal drug statute in the workplace, the Department shall notify the appropriate federal agency within 10 days of receipt of notice regarding such conviction. The Department must, within 30 calendar days of receiving notice of or becoming aware of a conviction for unlawful use of alcohol or drugs, take appropriate personnel action against the employee.

APPENDIX
REASONABLE-SUSPICION TESTING CHECKLIST

Employee Name: _____

Employee Job Title: _____

Facility: _____

Location of Event: _____

Observation Date: ____/____/____ Time: _____ a.m. / p.m.

Was the employee performing a safety-sensitive duty? Yes ____ No ____

The following observations were made of the employee identified above:

Check ALL specific and contemporaneous observations and document the following:

Behavior

Appearance

Speech

____ Unsteady gait, stumbling

____ Flushed complexion

____ Slurred, thick

____ Drowsy, sleepy, lethargic

____ Cold, clammy sweats

____ Incoherent

____ Agitated, anxious,
restless

____ Bloodshot eyes

____ Exaggerated enunciation

☐ Hostile, belligerent	☐ Tearing, watery eyes	☐ Loud, boisterous
☐ Irritable, moody	☐ Dilated (large) pupils	☐ Rapid, pressured
☐ Depressed, withdrawn	☐ Constricted (pinpoint) pupils	☐ Excessively talkative
☐ Disheveled clothing	☐ Unfocused, blank stare	☐ Nonsensical, silly
☐ Clumsy, uncoordinated	☐ Unresponsive, distracted	☐ Cursing, inappropriate speech
☐ Tremors, shakes	☐ Unkempt appearance	
☐ Flu-like illness complaints	☐ Body odor of alcohol or marijuana	
☐ Hyperactive, fidgety		
☐ Suspicious, paranoid		
☐ Inappropriate, uninhibited behavior		
☐ Frequent use of mints, mouthwash, breath sprays, eye drops		

Other observations: _____

Supervisor Signature: _____ Date: ____/____/____

Supervisor Name: _____

Additional witnesses (optional):

Witness Signature: _____

Date: ____/____/____

Witness Signature: _____

Date: ____/____/____

TEST DETERMINATION

☐ DOT ☐ NON-DOT ☐ NO Test Conducted

☐ Reasonable Suspicion Alcohol Test ☐ 8 hours elapsed for alcohol test

___ Reasonable Suspicion Drug Test ___ 32 hours elapsed for drug test

___ No Test Required ___ Employee transported for medical care

___ Employee Refused Test ___ Other (explain);

___ Employee transported to collection site by: _____

Time of Transport: _____ a.m. / p.m.

Collection Facility: _____