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July 12, 2004
Docket Number: 04-7984

The Honorable Tommy Thompson, Secretary
Department of Health and Human Services (HHS)
200 Independence Avenue SW
Hubert H. Humphrey Building
Washington, D.C. 20201

Dear Mr. Secretary:

The Association of Flight Attendants-CWA, AFL-CIO, which represents 46,000 flight attendants at 26 U.S. carriers, is pleased to have the opportunity to submit comments on proposed new regulations to test hair, sweat and oral fluids for the presence of illegal drugs and on point of collection testing (POCT).

We believe in a drug-free workplace. Our lives and the lives of our passengers depend on it. We are accountable for responding to any safety or security problem in the cabin -- from an inflight fire to a violent or abusive passenger -- and often work 12 to 16 hour days mostly on our feet. We must be able to evacuate an airplane in 90 seconds and now, tragically, perform our duties in the face of sophisticated terrorist threats.

But we are greatly distressed that these proposals are being submitted for adoption by interested agencies rather than in the form of an Advanced Notice of Proposed Rulemaking (ANPRM). From our perspective, the Department has not answered the questions necessary to proceed to formal rulemaking. It should postpone implementation of a final rule until is has sponsored sufficient scientific research to guarantee all categories of employees in the test pool will be ensured a valid and fair test result.

By the Department's own admission, there is a paucity of scientific studies on the proposed testing methodology and environmental contamination is poorly understood. The potential for race-based bias due to darker hair color is treated casually. The standard for confirmatory tests has been relegated to "most commonly used" (in 2004) rather than the best test available. The Department is delegating some compliance responsibility for point of collection testing to any federal agency which chooses to use it, leaving final responsibility unclear.

There are no guarantees that the results of screening tests at the point of collection will remain confidential until the higher level confirmatory test is done. An employee could be labeled a drug user inappropriately, without access to due process. Quality control is at additional risk because two different testing entities are involved. In other words, the

fundamentally necessary quality assurance and quality control standards to protect employees from inaccurate results are not in place.

The employee has a right to testing which is at least as accurate as the existing federal drug testing program. Any new testing procedures must be accurate beyond a reasonable doubt. The evidence against the employee must be unassailable because a failed test often results in termination of employment and a record preventing employment at another airline.

Thus we urge the Department to continue necessary investigations until unanswered questions are fully resolved and employee protections are firmly in place. This is necessary to avoid the substantial mistakes encountered in the first years of the validity testing program, which are legend. The burden of the failures was borne by employees who lost their jobs due to inaccurate test results. This cannot happen again.

HHS labs were certified for drug testing, but not for validity testing, when validity testing began. Later it was discovered that a number of these labs had truncated or rounded the testing results, in violation of the Department's advisory PD 35. Over three hundred test results were determined to be inaccurate and a program to certify the labs for validity testing was inaugurated. In all probability, the vast majority of these employees who were falsely accused of cheating were terminated and never exonerated and rehired.

Subsequently, many flight attendants and one pilot were accused of failing a test for substitution and another pilot was accused of failing a test for adulteration. The flight attendants were able to reproduce samples at the same levels as their initial "substituted" samples, proving they naturally produced ultra-dilute samples. The pilot accused of failing a substitution test lost his license and was entitled to an appeal process at the National Transportation Safety Board (NTSB). The pilot was able to gain substantial access to the laboratory and uncover numerous laboratory errors; the results of his test were overturned. Another pilot failed a test for adulteration. This failed test result was overturned by the NTSB because the confirmatory test did not rely on a fundamental principle in forensic toxicology -- that at least two different analytical techniques must be used to ensure an accurate test result. (The second test must use a different physical or chemical property than the initial test.)

These problems resulted from a validity testing process in which the Department had great confidence. Now the Department proposes to let federal agencies experiment with alternative testing methods, with infrequent HHS oversight. This is as unnecessary as it is unwise because an acceptable program for drug testing is already in place. And it is profoundly unfair to the employee.

In summary, we urge the Department to delay implementation of final regulations until available scientific research guarantees all categories of employees in the testing pool will be ensured a valid and fair test result. A valid test result cannot be obtained when the Department needs to qualify its recommendations with phrases like "despite these limitations" and "under

normal circumstances." When valid results can be guaranteed, the proposed regulations must be modified to include the following additional protections for employees:

The confirmatory test must be the best available test and the confirmatory test for substitution must use a different analytical principle or chemical reaction than the one used for the initial test -- the same standard proposed for hair, sweat, oral fluid and adulteration testing.

Fairness to employees must be guaranteed in each type of testing proposed. Hair testing cannot proceed if it is biased against individuals with dark hair or skin color. The initial results of oral fluid testing, and any other point of collection test (POCT), must be protected from disclosure until the confirmation test is conducted. Sweat testing cannot be adopted until procedures to protect employees who develop rashes are detailed, the potential for environmental contamination is clearly understood, and limitations on testing frequency are imposed to prevent employee harassment.

Definitions and standards must be sufficiently precise to protect employees. The definition of substitution for the three new types of testing proposed is a contradiction in terms, as two are directly observed tests. A precise standard for collection devices is necessary. Visual privacy during testing is essential. Delegation of some compliance responsibility to agencies who choose to engage in POCT is dangerously unclear: detailed standards for who has what responsibility are necessary. For POCT testing, employees must have the right to observe the quality control tests to determine if the equipment is functioning properly just as they do in alcohol testing.

- Employees must have access to records relating to their test results and records of lab certification or revocation-of-certification. Employees and their labor unions must have access to information in the possession of employers, service agents and laboratories that can reveal laboratory and other testing, analytic and reporting errors. Employees and their unions must have the right to a forum in which to present such exculpatory evidence. In the absence of such procedures, an employee does not have access to due process.

I have provided additional details to these comments in the attachment to this letter. I appreciate your consideration of our perspective.

Sincerely,

Patricia A. Friend
International President

Attachment to Letter from
Patricia A. Friend, International President
Association of Flight Attendants-CWA

1. Limitations of Hair Testing. The Department admits that the number of studies is limited and that data show higher concentrations of some drugs in dark hair when compared to blond or red hair. The Department cites a few studies: one was qualified as showing "little statistical evidence" of selective binding of drugs to hair of a particular color, and another "failed to detect a significant hair color effect." Nevertheless, the Department goes on to state:

> Despite these suspected limitations, the Department still proposes to go forward with incorporation of this new technology as an alternative to urine for Federal agencies who may find it useful in certain missions and tasks that only individual Federal agencies can identify. Though there continues to be some question about the effect of hair color on the amount of a drug or its metabolite present in hair, there is no question about the fact that the drug or metabolite is present.

We are pleased that the Department is specifically requesting comments on the hair color bias issue. We do not believe hair testing can go forward until the bias issue is firmly resolved. A biased test is inherently unfair. The Department has gone to great lengths to ensure tests are valid through validity testing. The Department must recognize that any test with disparate effects on different populations is inherently invalid.

The confirmation test is no longer the best available test. Reference is made to a more sophisticated test and the testing method of choice in recent years. Language referencing the best available test must be restored as a standard.

2. Limitations of Oral Fluid Testing. The Department admits that further scientific study is necessary to determine whether the presence of THC, the parent drug of marijuana, is present in the oral cavity due to drug use or environmental contamination. It therefore proposes that a second biological specimen, a urine specimen, be collected at the same time. Our primary concern is that the initial test of oral fluid will be done at a different location than the urine testing. Consequently, the preliminary results of the test of an oral fluid could be made available prior to the results of the confirmatory test, unfairly tainting the employee as a drug user. Our fear is based on the fact that there is no guarantee the uninspected results of the oral tests will be forwarded to the labs immediately. As with hair testing, the best available confirmation test must be required.

3. Limitations of Sweat Testing. Adopting sweat testing standards is premature as well. The Department cites conflicting studies. It then concludes that external absorption of any drugs through the outer layer is not possible under "normal circumstances". It does not explain what might happen under abnormal circumstances or the consequences for the employee. HHS proposes the skin be washed with soap and water or a disposable towelette and then cleaned with

alcohol where the patch will be worn. It cites no studies concluding this procedure will remove environmental contamination. In fact, the Department encourages further research in this area.

There are no protections for cabin crew and flight crew who suffer rashes after the patches are applied. They cannot return to the test site to have the patches removed in the middle of a flight. Even if the patches are applied after a trip, many cabin and flight crew live a substantial distance from their domiciles and must commute to work due to airline mergers and acquisitions. How severe a rash must they suffer before they themselves can remove the patch? Who is responsible for lost days at work if appearance prevents one from performing one's duties in accord with the employer's standards?

This concern should not be taken lightly. Before the transmission of AIDS was understood, airlines tried to prevent healthy HIV-positive flight attendants from working because flight attendants serve food. The transmission of SARS on airlines is feared. A flight attendant with a rash would not be permitted to work. Use of sick leave more than three times in a given year can be considered a dependability problem for flight attendants: verbal warnings, written warnings, and more serious consequences can result. While the government is reluctant to enter into labor-management relations issues, it must do so in this case to prevent any adverse effect on the employee.

According to the regulations, the donor must wear the patches for no less than three and no more than seven days before returning to the collection site. What happens to a flight attendant or pilot who begins wearing a patch on the first day of a four day trip, has two days off, and then begins another four day trip? What happens if there is an appropriate arrangement for removing the patch at the end of a trip segment but this arrangement interferes with another federal rule - the Federal Aviation Administration's flight and duty time regulations?

The Department has imposed no limits on the use of this technology. Theoretically, an employee subject to return-to-duty testing could be required to wear a patch on a permanent basis. This would be harassment, not testing, especially since the patch violates reasonable expectations of privacy with a clear visual stigmatization. Reasonable limits on the use of this technology must be established in the regulations.

4. Definitions. The definitions of confirmatory tests are inadequate. They do not even refer to a higher quality test, let alone the highest quality test we are requesting. Instead, they merely refer to a second test performed on a different aliquot of the original specimen. The definition of "dilute" is oblique, at best, to the layman. It is: "Refers to a specimen with less than normal physiological constituents." Both normal and less than normal physiological constituents, and possible legitimate causes of less than normal, must be addressed in considerable detail before "dilute" can be applied to any of these three tests. We find the definition of "substituted" to be a contradiction in terms because two of the three proposed new tests, oral fluids and hair, are observed directly by the collector. The definition is: "A specimen that could not have been derived from the donor's body at the time of collection because it is

inconsistent with normal physiology."

5. Privacy. The new regulations propose that "the donor must be allowed privacy" for a hair or sweat test and that only the collector may be present for an oral fluid test. These protections are insufficient. The donor must be promised visual privacy in all three cases. Because these tests are experimental, the donor must have the right to the presence of a union representative if the donor so requests.

6. Collection Devices. There is the illusion of a standard. "Only a collection device that does not affect the specimen collected may be used," according to the regulations. Nevertheless, federal agencies are given the latitude to determine if a device does not affect collection even if the device has not been approved by the FDA. How can an employee defend him or herself against the charge of a failed or invalid test result when there are no true standards for collection containers?

7. Confirmatory Test Standards. We applaud the Department's decision to require that confirmation tests for hair, sweat, oral fluids and adulteration use a different analytical principle or chemical reaction than used for the initial test. We are puzzled that the standard for a substituted test, which permits use of the same colorimetric test for both the initial and confirmatory test, is the only test not based on this fundamental scientific principle. We strongly urge the Department to require use of a test with a different analytical principle or chemical reaction for the confirmatory test than used for the initial test for substitution. And, as stated previously, it is imperative that the standard for all confirmatory tests use the best available technology.

8. Validity Tests for Hair and Oral Fluids Testing. The collector appears to have total control of the testing process in both cases. How can a legitimate charge of employee cheating arise? From our perspective, if the result is invalid, the problem is with the process, not the employee. If the Department permits validity testing for hair and oral fluids, it must present scientific evidence regarding how an employee's actions could lead to an invalid result.

9. Point of Collection Testing (POCT). The Department has justified these tests for circumstances "where it is critical to receive an immediate test result." Yet the initial findings must be confirmed in an HHS-certified lab. This is the only proposed test where the results of the initial test, without any question, can become known to the collector. The damage to an innocent employee does not seem to have been considered. The fact that HHS-certified labs only confirm 80% of initial positives seems to have been forgotten.

The language: "tests presumptive drug positive, adulterated, substituted, or invalid" is a new concept and should be eliminated. The standard reference to "initial test" should be used instead. The proposed regulations state the these presumptive positive samples are to be sent to an HHS-certified lab for "additional testing". The standard must be a confirmatory test using the best available technology and a different analytical principle or chemical reaction. Quality

control tests must be conducted but the employee is not permitted to witness them. Each employee being tested should be able to ascertain that the equipment is functioning properly as is the case with alcohol testing.

cc: Walter F. Vogl, Drug Testing Section, Division of Workplace Programs