

restrictions that are included in other grant agreements.

Section 1643.5 Recipient Policies, Procedures and Recordkeeping

This section requires the recipient to establish written policies and procedures to guide the recipient's staff to ensure compliance with this rule. Recipients are also required to maintain sufficient documentation to demonstrate compliance with this part. The type of recordkeeping necessary to demonstrate compliance with this rule would be documentation that only non-LSC funds were used for any activities prohibited by this rule.

List of Subjects in 45 CFR Part 1643

Grants, Health Care, Legal Services, Lobbying.

For reasons set forth in the preamble, LSC proposes to amend Chapter XVI of Title 45 by adding part 1643 as follows:

PART 1643—RESTRICTION ON ASSISTED SUICIDE, EUTHANASIA, AND MERCY KILLING

Sec.

1643.1 Purpose.

1643.2 Definitions.

1643.3 Prohibition.

1643.4 Applicability.

1643.5 Recipient policies, procedures and recordkeeping.

Authority: Pub. L. 105-12; 42 U.S.C. 2996f (b)(11).

§ 1643.1 Purpose.

This part is intended to ensure that recipients do not use any LSC funds for any assisted suicide, euthanasia or mercy killing activities prohibited by this part.

§ 1643.2 Definitions.

(a) Assisted suicide means the provision of any means to another person with the intent of enabling or assisting that person to commit suicide.

(b) Euthanasia (or mercy killing) is the active means by one person to cause the death of another person for reasons assumed to be merciful, regardless of whether the person killed consents to be killed.

(c) Suicide means the act or instance of taking one's own life voluntarily and intentionally.

§ 1643.3 Prohibition.

No recipient may use LSC funds to assist in, support, or fund any activity or service which has a purpose of assisting in, or to bring suit or provide any other form of legal assistance for the purpose of:

(a) Securing or funding any item, benefit, program, or service furnished for the purpose of causing, or the purpose of assisting in causing, the

suicide, euthanasia, or mercy killing of any individual;

(b) Compelling any person, institution, or governmental entity to provide or fund any item, benefit, program, or service for such purpose; or

(c) Asserting or advocating a legal right to cause, or to assist in causing, the suicide, euthanasia, or mercy killing of any individual.

§ 1643.4 Applicability.

(a) The restriction in § 1643.3 shall not apply to or affect any limitation relating to:

(1) The withholding or withdrawing of medical treatment or medical care;

(2) The withholding or withdrawing of nutrition or hydration;

(3) Abortion; or

(4) The use of items, goods, benefits, or services furnished for purposes relating to the alleviation of pain or discomfort even if they may increase the risk of death, unless they are furnished for the purpose of causing or assisting in causing death.

(b) This part does not apply to activities funded with a recipient's non-LSC funds.

§ 1643.5 Recipient policies, procedures and recordkeeping.

The recipient shall adopt written policies and procedures to guide its staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part.

Dated: September 25, 1997.

Suzanne B. Glasow,

Senior Assistant General Counsel.

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Parts 653 and 654

[Docket No. FTA-97-2925]

RIN 2132-AA56

Prevention of Prohibited Drug Use in Transit Operations; Prevention of Alcohol Misuse in Transit Operations

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: In response to a request from a transit agency, the Federal Transit Administration (FTA) proposes to allow employers to use the results of post-accident drug and alcohol tests administered by State or local law enforcement personnel when the State and local law enforcement officials have

independent authority for the tests and the employer obtains the results in conformance with State and local law. In short, in a very limited number of cases, the employer would be relieved of administering post-accident drug and alcohol tests. If this amendment is adopted, it could ease the burden of employers in testing "safety-sensitive" employees after an accident has occurred; it may also relieve some "safety-sensitive" employees from taking duplicative post-accident drug and alcohol tests.

DATES: Comments on this proposed rule must be submitted by December 1, 1997.

ADDRESSES: Written comments must refer to the docket number that appears above and be submitted to the United States Department of Transportation, Central Dockets Office, PL-401, 400 Seventh Street, S.W. Washington, D.C. 20590. All comments received will be available for inspection at the above address from 10 a.m. to 5 p.m., e.t. Monday through Friday, except Federal holidays. Those desiring the agency to acknowledge receipt of their comments should include a self-addressed stamped postcard with their comments.

FOR FURTHER INFORMATION CONTACT: For program issues: Judy Meade, Director of the Office of Safety and Security (202) 366-2896 (telephone) or (202) 366-7951 (fax). For legal issues: Nancy Zaczek, Office of the Chief Counsel (202) 366-4011 (telephone) or (202) 366-3809 (fax). Electronic access to this and other rules may be obtained through FTA's Transit Safety and Security Bulletin Board at 1-800-231-2061 or through the FTA World Wide Web home page at <http://www.fta.bts.gov>; both services are available seven days a week.

SUPPLEMENTARY INFORMATION:

I. Background

On February 14, 1994, FTA issued 49 CFR parts 653 and 654, which require recipients of certain categories of FTA funding to test safety-sensitive employees for the use of five prohibited drugs and the misuse of alcohol. In addition to five other types of testing, not relevant to this discussion, the rules require employers to conduct post-accident testing of certain safety-sensitive employees within eight hours of the accident for the misuse of alcohol and within 32 hours for the use of prohibited drugs. (The standards for determining which "safety-sensitive" employees must be tested are set out in the rule and are not relevant to this discussion.) If an employer cannot test

such employees within the specified time period, the rules require the employer to prepare and maintain a record stating why such test was not promptly administered.

On February 6, 1996, Mr. William Millar, as Executive Director of the Port Authority of Allegheny County (Port Authority), asked FTA to accept the results of a post-accident drug and alcohol test administered by a State or local law enforcement official or emergency medical personnel as meeting the requirements of FTA's drug and alcohol rules, in other words, to "federalize" these locally administered tests.

Mr. Millar's request was prompted by a collision between two buses that had occurred on January 12, 1996 on the Martin Luther King Busway in Pittsburgh, Pennsylvania. Mr. Millar described the accident as follows:

At approximately 7:10 a.m., in adverse weather conditions, a bus traveling from [d]owntown Pittsburgh crossed the center line and collided with an inbound bus. The driver of the inbound vehicle was killed. The operator of the outbound bus was severely injured and taken to a local hospital for emergency surgery. He remained on the hospital's 'critical' list for approximately four days and underwent additional surgery.

Due to the driver's medical condition and unconsciousness, Port Authority's Drug and Alcohol Program personnel were unable to conduct substance tests meeting federal standards. Nevertheless, it appears that blood tests were taken on both operators which could determine their use of alcohol or prohibited drugs. Reports from local law enforcement officials have revealed that neither driver had drugs or alcohol in their systems. However, if drugs or alcohol had been found, Federal regulations make clear that tests administered by either the hospital or law enforcement officials on the surviving bus operator would not have met [F]ederal standards, regardless of the quality of the hospital, the legality of the police investigation or the proficiency of the laboratories used to conduct the tests.

To remedy this situation, Mr. Millar suggested that FTA amend the regulations to allow a "post-accident medical emergency testing procedure," which would include

(a) The permissible use by a public transit agency of a blood or urine sample drawn by hospital personnel and submitted by the transit agency to a laboratory certified by the Department of Health and Human Services when the blood or urine is collected: (i) in the course of routine medical procedures; or (ii) upon the request of law enforcement or regulatory personnel; or (iii) upon the request of authorized personnel of the transit agency's Drug and Alcohol Program[.]

(b) The permissible use of blood or urine test results when said tests, whether initiated by hospitals or law enforcement personnel, meet the requirements of state law with

respect to chain of custody of the samples and medical certification or expertise of the laboratories.

Mr. Millar further suggested that a post-accident medical emergency be presumed by the employer whenever, following an accident involving death or personal injury to any person:

(a) A covered employee has reported to or been transported to a medical facility for the receipt of emergency medical care; or (b) a covered employee is a patient in a medical facility and is unconscious or substantially impaired to prevent testing by transit agency personnel.

II. FTA's Response

As Mr. Millar's letter illustrates, conducting post-accident tests within the timeframes specified by the rules is frequently difficult and sometimes impossible. FTA provided for this situation by allowing employers to prepare and maintain a record stating why a test was not promptly administered. Mr. Millar's letter, however, highlights a "gap" in FTA's rules; in some instances, an employer may not be able to test a "safety-sensitive" employee, although the employee has undergone drug and alcohol tests administered by local police or by medical personnel. Should the employer be able to use those results to meet the requirements of the rules, and if so, under what circumstances?

Mr. Millar suggested that an employer should be able to direct medical personnel to perform blood, breath, and urine tests on "safety-sensitive" employees who are receiving medical treatment after an accident has occurred. FTA, however, does not have the authority to require medical personnel to perform these tests; hence, we have not adopted this particular suggestion.

Mr. Millar further suggested that an employer be permitted to use the results of any tests performed by medical personnel as part of the routine post-accident medical examination of the "safety-sensitive" employee. Again, FTA does not have the authority to require medical personnel to provide the results of these tests to the employer. Hence, we do not propose to adopt this suggestion.

Mr. Millar also suggested that an employer use the results of any tests conducted by State or local law enforcement personnel as part of their accident investigation. This proposed amendment could strike a reasonable balance: the "safety-sensitive" employee is protected by the standards and procedures of State and local law, and the traveling public is protected by allowing the employer to use the test

results, if necessary, to remove a "safety-sensitive" employee from his or her "safety-sensitive" position.

However, it must be emphasized that the tests must be conducted in conformance with State and local law and the results be obtained by the employer in conformance with State and local law.

Although FTA proposes this change to the rules, we do not believe that employers would be able to use it frequently, based on the experience of the Federal Highway Administration (FHWA). Currently, FHWA allows employers to use the results of post-accident tests conducted by State or local law enforcement officials if the employer can obtain those results; because of privacy concerns, however, employers frequently cannot obtain them. Moreover, this rule, if adopted, could not provide an employer any authority to require the police to perform the tests for the employer or to give the employer the results of tests performed at the police's initiative.

In the few cases when the employer can obtain the results from the police, this amendment could be extremely useful. First, it would allow an employer to use the results of a blood test, which is not authorized under FTA's rules. Second, an employer could use the test results, so long as the test was administered in accordance with State or local law, which means that the employer is not obligated, in this very narrow class of cases, to follow the procedures specified in 49 CFR part 40. In other words, for these cases, State or local law would supersede part 40.

We seek comment on this proposed amendment.

III. Regulatory Analyses and Notices

This is not a significant rule under Executive Order 12866 or under the Department's Regulatory Policies and Procedures. There are no significant Federalism implications to warrant the preparation of a Federalism Assessment. The Department certifies that this rule will not have a significant economic impact on a substantial number of small entities; allowing employers to use the results of a post-accident drug and alcohol test administered by or under the direction of State or local law enforcement personnel is unlikely to significantly increase the costs for employers.

List of Subjects in 49 CFR Parts 653 and 654

Alcohol testing, Drug testing, Grant programs—transportation, Mass transportation, Reporting and

recordkeeping requirements, Safety and transportation.

For the reasons set forth in the preamble, FTA proposes to amend Title 49 Code of Federal Regulations, part 653 and 654 as follows:

PART 653—PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

1. The authority citation for part 653 continues to read as follows:

Authority: 49 U.S.C. 5331; 49 CFR 1.51.

§ 653.45 [Amended]

2. Section 653.45 is amended by adding paragraph (d) to read as follows:

* * * * *

(d) The results of a blood or urine test for the use of prohibited drugs, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State, or local testing requirements, and that the test results are obtained by the employer.

PART 654—PREVENTION OF ALCOHOL MISUSE IN TRANSIT OPERATIONS

3. The authority citation for part 654 continues to read as follows:

Authority: 49 U.S.C. 5331; 49 CFR 1.52.

§ 654.33 [Amended]

4. Section 654.33 is amended by adding paragraph (d) to read as follows:

* * * * *

(d) The results of a blood or breath test for the misuse of alcohol, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State, or local testing requirements, and that the results of the tests are obtained by the employer.

Issued on: September 24, 1997.

Gordon J. Linton,

Administrator.

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