

TITLE 10 PUBLIC SAFETY AND LAW ENFORCEMENT
CHAPTER 12 PUBLIC DEFENDER DEPARTMENT
PART 8 DRUG AND ALCOHOL ABUSE

10.12.8.1 ISSUING AGENCY: Public Defender Commission
[10.12.8.1 NMAC - N, 7/1/2015]

10.12.8.2 SCOPE: Applies to all employees.
[10.12.8.2 NMAC - N, 7/1/2015]

10.12.8.3 STATUTORY AUTHORITY: Section 31-15-2.4(B)(6) NMSA 1978 and Section 31-15-7 NMSA 1978.
[10.12.8.3 NMAC - N, 7/1/2015]

10.12.8.4 DURATION: Permanent.
[10.12.8.4 NMAC - N, 7/1/2015]

10.12.8.5 EFFECTIVE DATE: 7/1/2015, unless a later date is cited at the end of a section.
[10.12.8.5 NMAC - N, 7/1/2015]

10.12.8.6 OBJECTIVE: The objective of Part 8 of Chapter 12 is: to provide employees with information on the effects of drug and alcohol abuse; to require drug, alcohol testing or both; and to establish required collection, screening, rehabilitative and sanction parameters.
[10.12.8.6 NMAC - N, 7/1/2015]

10.12.8.7 DEFINITIONS:

A. "Alcohol" means all consumable non-prescription substances which contain alcohol, specifically including, without limitation, spirits, wine, malt beverages, and intoxicating liquors.

B. "Aliquot" means a portion of a urine specimen used for testing.

C. "Chain of custody" refers to procedures to account for the integrity of each specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. In any dispute regarding chain of custody, the identity and integrity of the sample at issue may be established by a preponderance of the evidence.

D. "Confirmatory test" means a second analytical procedure to identify the presence of a specific drug or metabolite in a urine specimen by gas chromatography/mass spectrometry (GC/MS).

E. "Drug" means marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines; a metabolite of those drugs; or any non-prescription substance containing those drugs.

F. "Initial test" means an immunoassay screen which meets the requirements of the food and drug administration to eliminate negative specimens from further consideration.

G. "Medical review officer" means a New Mexico based and licensed physician knowledgeable in the medical use of prescription drugs and alcohol and the pharmacology and toxicology of illicit drugs and alcohol.

H. "Non-prescription" refers to all substances other than a substance prescribed by a doctor or licensed health professional to the employee.

I. "On duty" means any time during an employee's regular workday or other period during which the employee is required or permitted to work by the employer, including overtime, lunch and other breaks, and anytime while operating or riding in a state vehicle.

J. "Possession" means to knowingly have, own, or have on oneself the drug, the alcohol or both.

K. "Reasonable suspicion" means a belief drawn from specific objective and articulable facts and the reasonable inferences drawn from those facts.

[10.12.8.7 NMAC - N, 7/1/2015]

10.12.8.8 SUBSTANCE ABUSE COORDINATOR:

A. The human resource director or designee shall serve as the substance abuse coordinator who shall be responsible for the department's drug and alcohol abuse program.

B. The substance abuse coordinator shall provide drug and alcohol abuse awareness information to employees including but not limited to the:

- (1) dangers of drug and alcohol abuse;
- (2) availability of counseling, rehabilitation, and employee assistance programs; and
- (3) sanctions that may be imposed upon employees.

C. The substance abuse coordinator shall ensure that the agency has contracted or made arrangements with a medical review officer to perform the duties required by 10.12.8.14 NMAC.
[10.12.8.8 NMAC - N, 7/1/2015]

10.12.8.9 AUTHORIZED DRUG AND ALCOHOL TESTING:

A. The department shall require employees to undergo drug, alcohol testing or both if the department has a reasonable suspicion that the employee has committed drug or alcohol abuse based on, but not limited to:

(1) direct observation of the physical symptoms or manifestations of being under the influence of a drug or alcohol while on duty; such symptoms may include, but are not limited to liquor on breath, slurred speech, unsteady walk, or impaired coordination; or

(2) direct observation of the use or possession of drugs or drug paraphernalia, or the use of alcohol while on duty.

B. An employee shall submit to a reasonable suspicion drug or alcohol test provided the requesting supervisor has secured the next level supervisor's approval, unless the requesting supervisor is the chief. The requesting supervisor shall prepare a contemporaneous memorandum outlining the details leading up to the reasonable suspicion drug or alcohol test. The memorandum shall be submitted to the substance abuse coordinator or designee within 24 hours of the request for testing.

[10.12.8.9 NMAC - N, 7/1/2015]

10.12.8.10 COLLECTION OF SPECIMENS:

A. Unless otherwise specified in these rules, urine specimens for drug testing shall be collected by a laboratory meeting state licensure requirements and certified by the substance abuse and mental health services administration or the college of American pathologists in forensic urine drug testing.

B. Breath specimens may be collected by a certified person, a medical or a laboratory facility. Should the medical or laboratory facility not be available or should the equipment fail, the substance abuse coordinator or designee shall designate another testing facility and report this referral to the human resource director within ten working days of taking the breath specimen.

[10.12.8.10 NMAC - N, 7/1/2015]

10.12.8.11 DRUG TESTS:

A. The initial and confirmatory drug tests shall be performed by a state licensed laboratory in accordance with the substance abuse and mental health services administration or the college of American pathologists in forensic urine drug testing. The laboratory shall have the capability of performing initial and confirmatory tests for each drug or metabolite for which service is offered.

B. The following initial cutoff concentrations shall be used when screening specimens on the initial drug tests to determine whether they are negative for these seven drugs or classes of drugs.

- | | | |
|-----|-----------------------|---------------|
| (1) | Marijuana metabolites | 75 (ng/ml) |
| (2) | Cocaine metabolites | 150 (ng/ml) |
| (3) | Opiate metabolites | 2,000 (ng/ml) |
| (4) | 6-Acetylmorphine | 10 (ng/ml) |
| (5) | Phencyclidine (PCP) | 25 (ng/ml) |
| (6) | Amphetamines | 500 (ng/ml) |
| (7) | MDMA | 500 (ng/ml) |

C. All specimens identified as positive on the initial drug test, shall be confirmed by the laboratory at the cutoff concentration listed below for each drug. All confirmations shall be by quantitative analysis:

- | | | |
|-----|--|---------------|
| (1) | Marijuana metabolite - Delta - 9-tetrahydrocannabinol - 9-carboxylic acid (THCA) | 25 (ng/ml) |
| (2) | Cocaine metabolite - Benzoylcegonine | 100 (ng/ml) |
| (3) | Opiates: | |
| | (a) Morphine | 2,000 (ng/ml) |
| | (b) Codeine | 2,000 (ng/ml) |
| (4) | 6-Acetylmorphine | 10 (ng/ml) |
| (5) | Phencyclidine (PCP) | 25 (ng/ml) |

- (6) Amphetamines:
 - (a) Amphetamine 250 (ng/ml)
 - (b) Methamphetamine¹ 250 (ng/ml)
- (7) MDMA (Methylenedioxymethamphetamine) 250 (ng/ml)
 - (a) MDA (Methylenedioxyamphetamine) 250 (ng/ml)
 - (b) MDEA (Methylenedioxyethylamphetamine) 250 (ng/ml)
- (8) ¹To be reported as positive for methamphetamine, a specimen must also contain

amphetamine at a concentration equal to or greater than 100 ng/ml.

D. The laboratory shall report as negative all specimens that are negative on the initial test or negative on the confirmatory test. Only specimens reported as positive on the confirmatory test shall be reported positive for a specific drug.

E. The laboratory shall retain and place those specimens confirmed positive in properly secured long-term frozen storage for at least 365 calendar days. An agency may request the laboratory to retain the specimen for an additional period of time. If the laboratory does not receive a request to retain the specimen during the initial 365 calendar day period, the specimen may be discarded.

[10.12.8.11 NMAC - N, 7/1/2015]

10.12.8.12 ALCOHOL TESTS:

A. A test for alcohol shall be administered by a legally recognized and approved method.

B. A test by a legally recognized or approved method with results of blood alcohol content (BAC) level of .04 or more shall be deemed positive for alcohol.

C. The chief may approve a lower test result below 0.08% for blood alcohol content (BAC).

D. For employees who have undergone alcohol rehabilitation, pursuant to 10.12.8.17 NMAC, a positive test result during the 30 to 180 calendar days following the first positive test shall subject an employee to disciplinary action. Such a test may be performed by urinalysis.

[10.12.8.12 NMAC - N, 7/1/2015]

10.12.8.13 REPORTING OF TEST RESULTS:

A. Drug and alcohol test results shall be reported only to the substance abuse coordinator or designee.

B. The test report shall contain the specimen number assigned by the agency, the laboratory accession number and results of the tests. All specimens negative on the initial test or negative on the confirmatory test shall be reported as negative. Only specimens confirmed positive shall be reported positive. Results may be transmitted to the substance abuse coordinator by various means including certified mail with return receipt requested, courier service, or electronic mail in a secure area (e.g., facsimile or computer). Certified copies of all analytical results and chain-of-custody forms shall be available from the laboratory when requested by the chief, or substance abuse coordinator or designee.

C. The substance abuse coordinator or designee shall advise employees in writing of positive test results.

D. All records pertaining to a given urine specimen shall be retained by the laboratory for a minimum of two years.

E. Only those members of management who need to know shall be made aware of the test results. Breach of confidentiality may be grounds for disciplinary action.

[10.12.8.13 NMAC - N, 7/1/2015]

10.12.8.14 EXPLANATION OF POSITIVE TEST RESULTS:

A. Employees who test positive for drugs, alcohol or both may, within two workdays of being advised of the test results, submit a written request to the human resource director or the substance abuse coordinator for a review of the test results by the medical review officer. The test results of all employees who test positive for drugs, alcohol or both shall be referred by the agency's substance abuse coordinator or designee to the medical review officer.

(1) If the employee does not request a review of the test results within two workdays, the employee waives review by the medical review officer and any retesting of the.

(2) The medical review officer shall examine any proffered or possible explanations concerning the validity of the confirmed positive test results. This action may include conducting a medical interview, review of the medical history, review of the chain of custody, and discussions with the collection or laboratory personnel. The medical review officer shall review all medical records made available by the individual

when a positive test could have resulted from legally prescribed medications for medical or dental treatment. The medical review officer shall also review the results of any retest.

(a) Should any questions arise as to the accuracy or validity of a confirmed positive test result, only the medical review officer is authorized on behalf of the department to order a reanalysis of the original sample and such retests are authorized to be performed only at a laboratory that meets applicable provisions of any state licensure requirements and is certified by the substance abuse and mental health services administration or the college of American pathologists in forensic urine drug testing.

(b) Prior to making a final decision to verify a positive test result, the medical review officer shall give the employee an opportunity to discuss the test results. The discussion between the medical review officer and the employee may be in person or by telephone.

(c) The medical review officer shall advise the chief, the human resource director or appropriate substance abuse coordinator of his or her medical conclusions from the review of the test results. If there are conflicting factual statements, the medical review officer shall not attempt to resolve that factual conflict, but shall report it along with his or her medical conclusions to the department. Similarly, the medical review officer shall not attempt to ascertain the factual correctness of any claim by the employee of involuntary ingestion of drugs or alcohol or both, but shall simply report such claims to the agency substance abuse coordinator with his or her medical opinion as to the possibility that such occurrence could have affected the test results.

B. Based upon the medical review officer's report and such other inquiries or facts as the department may consider, the department shall determine whether the explanations or challenges of the confirmed positive test results are satisfactory.

(1) If the explanations or challenges of the positive test results are unsatisfactory the department:

(a) shall provide a written explanation to the employee as to why the explanation is unsatisfactory, along with the test results, within 11 calendar days of the department's determination; and

(b) shall retain such records as confidential for one year.

(2) If the explanations or challenges of the positive test results are satisfactory the department:

(a) shall notify the employee in writing within 11 calendar days of the department's determination; and

(b) shall retain such records as confidential for one year.

[10.12.8.14 NMAC - N, 7/1/2015]

10.12.8.15 RETESTING: Employees who tested positive for drugs or alcohol urine tests may elect to have, at their expense, an aliquot, if any exists, of the original urine specimen retested by another laboratory that meets applicable provisions of any state licensure requirements and is certified in forensic urine drug testing by either the substance abuse and mental health services administration or the college of American pathologists. The drug testing laboratory shall arrange for the shipment of the aliquot to the laboratory of the employees' choosing. The department shall pay for the retest if the retest is negative. Any remaining samples after the appropriate times listed here may be destroyed and the final results received will remain as the final record without further right to appeal or challenge the results.

[10.12.8.15 NMAC - N, 7/1/2015]

10.12.8.16 CONFIDENTIALITY: No laboratory reports or test results shall appear in the employee's personnel file unless he or she is subject of a disciplinary action. Laboratory reports or test results shall be placed in a special locked file maintained by the substance abuse coordinator or designee. Files relating to laboratory reports or test results maintained by the substance abuse coordinator are confidential within the meaning of 10.12.1.12 NMAC.

[10.12.8.16 NMAC - N, 7/1/2015]

10.12.8.17 REHABILITATION AND SANCTIONS:

A. Voluntary self-identification by employees:

(1) Any employee who requests referral to an employee assistance program (EAP), counseling or a drug or alcohol rehabilitation program, prior to directed to drug and alcohol testing due to reasonable suspicion shall be referred by the substance abuse counselor. Any costs for counseling or rehabilitation shall be borne by the employee.

(2) The chief may grant administrative leave to an employee to participate in an employee assistance program, counseling, or a drug or alcohol rehabilitation program for up to 240 hours for the initial voluntary self-identification only.

(3) Employees are subject to drug, alcohol testing or both at the discretion of the substance abuse coordinator at any time between 30 and 180 calendar days of requesting referral. Employees who test positive during this time period or fail to successfully complete such program may be subject to disciplinary action including dismissal. The chief may allow the employee to use annual leave, sick leave, or leave without pay for additional counseling or rehabilitation after considering all factors relevant to the employee's condition and job performance history.

(4) For employees who have been required to undergo an alcohol rehabilitation program, any indication of alcohol at any level during the 30 to 180 calendar day period following the referral shall be considered a positive test result.

B. Positive Reasonable Suspicion Testing:

(1) Employees who test positive on a reasonable suspicion drug or alcohol test or both required by these rules and do not have a satisfactory explanation for the positive test results shall be referred to an employee assistance program, counseling, or a drug or alcohol rehabilitation program.

(2) Employees are subject to drug or alcohol testing at the discretion of the substance abuse coordinator at any time between 30 and 180 calendar days of the first positive test. Any such employee who tests positive for drugs, alcohol or both between 30 and 180 calendar days of the first positive test without a satisfactory explanation or who fails to enter and successfully complete a program shall be subject to disciplinary action including dismissal.

(3) The chief may grant an employee administrative leave to participate in an employee assistance program, counseling, or a drug or alcohol rehabilitation program for up to 240 hours for the initial reasonable suspicion referral only.

C. Refusal to cooperate in testing procedure: Any employee who refuses or fails without good cause to cooperate in the drug or alcohol testing or both procedure by refusing or failing to complete the specified forms, by refusing or failing to submit a urine or breath specimen, or otherwise refuses or fails to cooperate shall be subject to disciplinary action including dismissal.

D. Possession of drugs or alcohol:

(1) Employees who illegally sell, purchase, or convey from one person or one place to another drugs or any substance in Schedules I and II of the Controlled Substances Act, Sections 30-31-1 to 30-31-41 NMSA 1978 (Repl. Pamp. 1994), while on duty shall be subject to disciplinary action including dismissal and shall be reported to the local law enforcement agency.

(2) When employees, while on duty consume or have in their possession drugs, open containers of alcohol or any substance in Schedules I and II of the Controlled Substances Act, Sections 30-31-1 to 30-31-41 NMSA 1978 (Repl. Pamp. 1994) without a valid prescription or as otherwise authorized by law, they shall be subject to disciplinary action including dismissal and shall be reported to the local law enforcement agency. [10.12.8.17 NMAC - N, 7/1/2015]

HISTORY OF 10.12.8 NMAC [RESERVED]