

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

ARTHUR BELL, JR., Appellant,

vs.

DEPARTMENT OF PUBLIC WORKS, SOLID WASTE MANAGEMENT,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on Dec. 17, 2012 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Whitney Traylor, Esq. Assistant City Attorneys Jennifer Jacobson and John-Paul Sauer represented the Agency. Having considered the evidence and arguments, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order.

I. STATEMENT OF THE APPEAL

Appellant Arthur Bell was an Equipment Operator for the Denver Department of Public Works in the Solid Waste Management Division (Agency). This is his appeal challenging his dismissal on July 11, 2012. Agency Exhibits 1, 2, 4, 8, 9, 15, 16 and 18 were admitted into evidence at the hearing. Appellant's Exhibits A - D, F, G, H, J and K were also admitted.

II. ISSUES

The issues in this appeal are as follows:

- 1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR),
- 2) Did the Agency establish that termination was within the range of penalties that could be imposed by a reasonable administrator for the proven misconduct?

III. FINDINGS OF FACT

Appellant Arthur Bell was employed by the Agency as an on-call Utility Worker in 2002, 2006 and 2008. He was hired as a Senior Utility Worker in 2008, and his position was re-allocated in 2011 to the classification of Equipment Operator. Appellant is required by his position to hold a Commercial Driver's License (CDL) issued under U.S. Department of Transportation (DOT) rules and regulations. CDL license holders are subject to drug and alcohol testing pursuant to the Omnibus Transportation Employee Testing Act, PL 102-143, 1991 HR 2942.

On Dec. 7, 2009, Appellant tested positive for marijuana during a random drug test under the DOT regulations. As a result, Appellant was charged with violations of Executive Order 94, Memorandum No. 94A, and two disciplinary rules. During the pre-disciplinary meeting, Appellant admitted to the violations and agreed to a settlement in order to avoid the possibility of dismissal from his employment. As a part of the settlement, Appellant agreed to a 30-day suspension and entry into a Stipulation and Agreement for Participation in a Substance Abuse Treatment/Education Plan. [Exhs. 8, 9.]

The 2010 Stipulation required Appellant to abstain from using all illegal substances including marijuana, comply with a substance abuse treatment plan, and submit to follow-up breath, urine or blood screening at the Agency's request for at least three years, among other terms. Violation of any part of the Stipulation "shall be considered a violation of the terms and conditions of employment [and] shall be grounds for dismissal." [Exh. 8-2.] Appellant waived the right to contest all but one issue if he was disciplined for violation of the Stipulation. "[T]he sole issue that he can raise on appeal . . . is whether he complied with the terms and conditions of this agreement." [Exh. 8-3.]

Over the next 18 months, Appellant submitted to random drug tests twice weekly and complied with his substance abuse treatment plan. On June 12, 2012, Appellant completed a urinalysis test in order to have his CDL license renewed. It was negative, and the new license was issued.

On Thursday, June 14, 2012, Appellant was called in for one of his weekly random drug tests. The following Monday, on-call Medical Review Officer (MRO) Clarence Kluck telephoned Appellant to inform him that the test was positive. [Exhs. 4, B, C.] Appellant told Dr. Kluck, "I don't see how it could be." Dr. Kluck stated that marijuana normally stays in the system for two weeks, but could remain only for hours or for several months. He noted that some medicines have marijuana in them and can result in a positive test.

Dr. Kluck testified that he wrote notes of his telephone interview with Appellant on his worksheet. He believes Appellant told him that he had taken medicine or marijuana in California. Dr. Kluck testified that he did not write that statement on the worksheet because it was not relevant to a test performed in Colorado. The worksheet is blank in the space provided for notes about any medications taken in the 30 days before the test. Dr. Kluck stated that he would have noted a statement about medicine use on the form "if it was at the right level." The form also bears no indication that Appellant was informed of his right to request testing of the split sample, as required by DOT regulations. 49 C.F.R. § 40.153. The interview began at 2:10 pm and ended at 2:12 pm. [Exh. C.]

A week later, Solid Waste Management Director Lars Williams called Appellant to discuss the test result. Appellant informed Mr. Williams that he had not been observed during the test. Mr. Williams told him that he could go to the clinic and ask for testing of the split sample. DOT requires that follow-up tests must be conducted under direct observation. 49 CFR § 40.67(b). A separate provision requires that an MRO must inform an employee that he has the right to have the split specimen tested within 72 hours. The MRO must also provide the contact information and remain available during that 72-hour period. 49 C.F.R. § 40.153. The worksheet does not show that Dr. Kluck provided that notice. [Exh. C.]

Mr. Williams was later advised by the testing laboratory Quest Diagnostics that Appellant should submit to another test during which he would be observed, in compliance

with DOT rules. Mr. Williams decided to follow that advice, despite also being informed that the testing clinic did not consider the lack of observation a significant flaw under the DOT regulations governing its tests. [Exhs. 16, 18; Williams testimony.] As a result, Appellant was ordered to appear for a second test on June 21, 2012. Appellant believed that the second test was arranged to vindicate him because "something went wrong" with the first test. The June 21st test resulted in a negative reading for marijuana metabolites. [Exh. D.]

The day before the June 21st test results were faxed to the Agency, Mr. Williams sent Appellant a pre-disciplinary letter. The letter alleged that Appellant had tested positive for marijuana on June 14th and that as a result he had violated Executive Order 94 and his Stipulation and Agreement. It asserted that for the same reason Appellant had neglected his duty and was under the influence or subject to the effects of an illegal drug. [Exh. 2.] At the pre-disciplinary meeting held on June 29, 2012, Appellant stated that he knew he was not positive.

Mr. Williams made the decision to terminate Appellant based on the results of the June 14th test. He found that Appellant had violated CSR § 16-60 A by neglecting his duty to obey Executive Order 94, and violated § G because he was under the influence of or subject to the effect of marijuana on June 14th. Mr. Williams also determined that the positive test established violations of Executive Order 94 and § 16-60 Y. Mr. Williams considered Appellant's past history, including the prior positive test in 2009 which was the basis of the Stipulation underlying this disciplinary action.

IV. ANALYSIS

In appeals of discipline brought before the Career Service Hearing Office under CSR § 19-10, an agency bears the burden to prove by a preponderance of the evidence that the conduct violated the Career Service Rules as alleged in the disciplinary letter. An agency must also establish that the penalty is within the range of discipline that can be imposed by a reasonable administrator under the circumstances. See Adkins v. Division of Youth Services, Dept. of Institutions, 720 P.2d 626, 628 (Colo.App. 1986).

All of the Agency's determinations of rule violations relied on a single factual finding: that Appellant tested positive for marijuana on June 14th. In making that finding, Mr. Williams stated that he applied the standards applicable under DOT and Executive Order 94 to conclude that Appellant had violated the terms of his Stipulation. Mr. Williams testified that he was unaware of Appellant's behavior on that date, and relied only on the test result in support of his conclusion that Appellant was under the influence of or subject to the effects of marijuana. He relied also on the Agency's policy that dismissal is imposed for a second positive drug test. [Testimony of Williams.] The sole issue on appeal therefore turns on whether the June 14th test result supports the findings and termination decision.

Executive Order 94 adopted "the illegal drug cut-off levels established by the DOT regulations". [Exh. 9-2.] The disciplinary letter included an excerpt from Memorandum 94A which stated that the phrase "'[s]ubject to the effects of an illegal drug' is to be determined consistent with the confirmation test levels established by the DOT regulations [for] marijuana metabolites ----15 ng." [Exh. 1-3.]

Drug testing laboratories conducting DOT tests operate under the procedures set forth in the applicable federal regulations. 49 C.F.R. Part 40. DOT regulations set different threshold

levels for positive test results for a screening test¹ and confirmatory test. A positive result on a screening test is 50 nanograms per milliliter (ng/mL) of marijuana metabolites, while a positive for the confirmatory test requires a level of only 15 ng/mL. 49 CFR § 40.87. The DOT standards apply to Appellant's employment by virtue of his 2010 Stipulation and Agreement and its reference to Executive Order 94. [Exhs. 9-2, 9-4, H-1, J-16.] Executive Order 94 specifically adopts the illegal drug cut-off levels established by the DOT regulations. "If there is a conflict between the DOT regulation, illegal drug levels and the ones contained in the Addendum to this Order, the DOT regulation definition will take precedence." [Exh. J-3.] The disciplinary letter references these standards and thereby confirms that the Agency intended to adopt the confirmation test level established by DOT regulations for marijuana, as required by Executive Order 94. [Exh. 1-2, 1-3.]

Here, the test result relied upon was 35 ngs, which is less than the 50-ng threshold for the initial (screening) test but more than the confirmatory test standard of 15 ngs. Thus, the challenge to the discipline turns on whether the June 14th result was from an initial or confirmatory test. If it was the initial test, it is well under the 50 ngs required for a positive result, and so a confirmatory test would not have been justified or ordered. If on June 14th the confirmatory test was performed, the result at the 35-nanogram level is sufficient to support a finding that the test result was positive.

The Agency did not present any testimony from the laboratory itself about the nature of the June 14th test. The laboratory report does not state whether the test conducted on Appellant's sample was an initial or confirmatory test. [Exh. B.] There is no indication that more than one test was performed on the sample.² If only one test was performed, it would have been the initial test using the 50 ng/mL standard, and Appellant's score of 35 ng would have yielded a negative test finding. Thus, the laboratory report alone is insufficient to resolve the issue of whether the 50 or 15 ng level should be applied to the June 14th test result.

The evidence from the Agency's witnesses was inconsistent on that subject. Staff Physician Szczukowski testified that the June 14th test was a drug screen, and the second test on June 21st was performed on the same sample. Dr. Kluck, the physician functioning as the MRO for the June 14th test, did not testify as to whether the June 14th test was either an initial or confirmatory test. Public Works Safety Director Marcel Linne stated that June 14th was the initial test. Mr. Williams was under the impression that the test on June 21st was the confirmatory test.

Dr. Szczukowski acts as an MRO for the City and County of Denver. She recalled that Appellant's first test was a drug screen that was reviewed by a different MRO. "There was one test done and then a second test on the same specimen . . . [Appellant] came back for a second time [because] the first was not observed and the second one observed". [Szczukowski testimony, 12/17/12, 11:24 am.] The doctor confirmed that DOT standards require that some tests must be observed.

Dr. Szczukowski explained that the initial or screening test is a rapid immunoassay. She testified that that test is not as accurate because it can produce false positives based on its tendency to cross-react with certain medicines. If an initial test is positive at level 50 ngs, a confirmatory test is then performed using the more accurate gas chromatography–mass

¹ The screening test is also referred to as the initial test. [See Exhs. D-1.]

² In fact, both the pre-disciplinary and disciplinary letters use the singular form of the noun when referring to the June 14th test. [Exhs. 1, 2.]

spectrometry (GC-MS) method, which measures as a positive the presence of at least 15 ngs of marijuana metabolites in the urine sample. Dr. Szczukowski did not perform the medical review of Appellant's test because she was unavailable on that day. The review was instead performed by on-call MRO Dr. Clarence Kluck, who used his own worksheet to record his contact with Appellant. [Exh. C.] Dr. Kluck was not asked about the nature of the June 14th test, and provided no testimony on that subject.

Agency Safety Director Marcel Linne testified that the June 14th test was the initial test, but the second test completed on June 21st was not the confirmatory test. The latter was instead a follow-up test required by Part 40 of the DOT regulations governing the collection process. Mr. Linne stated he has conducted about twelve tests a week for the past four years, and this is the first one that required a second test. Mr. Linne noted that it is the Department of Public Works policy to dismiss an employee for a second offense. [Linne testimony, Dec. 17, 2012.]

In his testimony, Mr. Williams appears to equate the second test with a confirmatory test.

Question by Mr. Whitney: And do you believe that the result of Mr. Bell's test on June 14th was that he registered 35 nanograms of marijuana metabolites?

Mr. Williams: Yes, sir.

Mr. Whitney: Is that the basis on which you made the decision to terminate Mr. Bell?

Mr. Williams: Yes, the positive.

Mr. Whitney: Okay, and do you know if a confirmatory test was conducted upon Mr. Bell?

Mr. Williams: You mean a second type?

Mr. Whitney: Yes.

Mr. Williams: When the clinic asked him to go down for a second time.

Mr. Whitney: So the only second test you are aware of is the June 21st test?

Mr. Williams: Correct.

Mr. Whitney: And that one resulted in a negative?

Mr. Williams: Correct.

[Testimony of Lars Williams, 12/17/12, 9:39 am.]

The Agency's position is further weakened by several other factors. Dr. Kluck testified that marijuana normally stays in the body for about two weeks. However, Appellant underwent two DOT urine tests just before and just after June 14th, both of which were negative. Appellant's CDL license required a urine test on June 12th, and his negative test on

that day led to renewal of that license. Appellant also submitted to a urine test on June 21st, a week after the June 14th positive test, at the instruction of Mr. Williams. That test too was negative for marijuana. [Exh. D.] Consistent with Dr. Kluck's medical opinion as to the average length on which marijuana remains in the system, DOT standards call for testing of a split sample within 72 hours of the notification to the employee of a positive test. The Agency failed to consider the contrary evidence of the two negative tests in determining whether the June 14th test was accurate.

Moreover, in two respects the test was not conducted in accordance with DOT regulations: it was not observed, and Appellant was not notified of his right to seek prompt testing of the split specimen. While the former irregularity was corrected by the June 21st test, the evidence does not indicate that the Agency gave any weight to the fact that the results were negative. Those test results are inconsistent with both the June 14th test and the Agency's own medical evidence that marijuana stays in the body for an average of two weeks. In addition, the MRO's failure to provide Appellant with notice of his right to have the split sample tested led to the loss of evidence that could potentially have invalidated the test results and allowed Appellant to rebut the discipline. In the absence of that notice, Appellant believed that the June 21st test was arranged to permit him to disprove the June 14th positive, and took no other action.

Appellant denied he had used marijuana or any illegal substance at or around the time of the test. He pointed out that he had readily admitted his previous use in 2009, and entered into the Stipulation and settlement to save his job. Thereafter he complied with the treatment plan and was tested twice a week. He confirmed that all results were negative, include the two tests just before and after the June 14th test, and the Agency's evidence does not dispute that. [Exh. D.]

The Agency's evidence is largely consistent with Appellant's denial of drug use throughout the disciplinary and appeal processes. The MRO's worksheet shows that, when told the result was positive, Appellant replied, "I don't know how it could be". [Exh. C-2.] Appellant repeated that denial at the pre-disciplinary meeting and at hearing. The only evidence to the contrary is Dr. Kluck's testimony that Appellant told him he used medicine or marijuana in California. The doctor stated that he would write down any statement made about medicine use on the worksheet, but explained that he had not done so here because it occurred in California rather than Colorado. It is not clear why the location of drug use would render the admission irrelevant. The doctor did not acknowledge that the statement was inconsistent with Appellant's denial of marijuana use. Later during his testimony, Dr. Kluck indicated that he was not sure Appellant had mentioned California. A conversation that consumed two minutes could not have covered more ground than what is reflected in the worksheet: the doctor's introduction of himself, his explanation for the purpose of the call, his communication of the test result, and Appellant's response to that result. I conclude based on the demeanor of the witness during his testimony that the doctor's recollection was faulty, and credit as reliable the contemporaneous notes made in the MRO worksheet. I find that Appellant has consistently denied that he used marijuana.

The Agency bears the burden of proof on the issue of whether the positive results of June 14th prove violations of the three cited disciplinary rules. The totality of the evidence persuades me that the Agency made its decision without taking into account relevant factors that would have been considered by a reasonable administrator before the imposition of termination. The Agency presented conflicting evidence about what type of test was administered on June 14th, evidence that places in doubt whether that result was positive or

negative. The Agency had control of all means by which that important factual issue could have been resolved. The decision-makers expressed uncertainty at hearing as to the nature of the test conducted on June 14th, and whether Appellant was governed by DOT standards or stricter standards set by the City and County of Denver. When the Agency bears the burden of proof to establish a factual matter, it is not within the purview of a hearing officer to resolve in the Agency's favor internal conflicts in the Agency's own evidence.

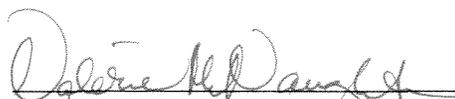
Mr. Williams and Mr. Linne both testified that it is the Agency's policy to terminate for a second positive test. The circumstances here demonstrate that the Agency acted quickly after receiving notice of the first test results. The pre-disciplinary letter was issued a day after Mr. Williams spoke with Appellant, a conversation that led to Appellant's denial and the ordering of a second test. The disciplinary process was initiated even before the Agency received the results of that second test, which results were negative for the presence of marijuana. [Exhs. 2, D.] The failure to observe DOT regulations in two respects may have been caused by the absence of any similar situation for four years. In any event, lack of notice of the right to split sample testing led to Appellant's loss of potential evidence in his favor. The Agency disregarded evidence of the two very recent negative results without explaining why it had done so, evidence that was inconsistent with the result reached on June 14th.

The Agency charged Appellant with neglect of duty, being under the influence of illegal drugs and conduct in violation of Executive Order 94. The evidence supporting all of those violations is the June 14th test. As found above, I find that the evidence as a whole did not establish that Appellant violated the cited rules by a preponderance of the evidence. Since the Agency failed to prove any violations of the disciplinary rules, the penalty issue is moot.

VI. ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered that the Agency's action dated July 11, 2012 is REVERSED.

Dated this 31st day of January, 2013.


Valerie McNaughton
Career Service Hearing Officer