

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

JOHN DELGADO,

Appellant/Respondent,

vs.

DEPARTMENT OF PUBLIC WORKS, STREET MAINTENANCE DIVISION, and the
City and County of Denver, a municipal corporation,

Agency/Petitioner.

This matter is before the Career Service Board on the Agency's Petition for Review. The Board has reviewed and considered the full record before it and **REVERSES** the Decision of the Hearing Officer, dated January 30, 2009, on the grounds outlined below.

I. FACTUAL BACKGROUND

Appellant was employed by the Agency as a heavy equipment operator. His duties required him to maintain a commercial driver's license (CDL) which in turn subjected him to federal Department of Transportation (DOT) requirements for random drug and alcohol testing. On July 27, 2007, Appellant was randomly selected for testing and tested positive for cocaine.

Separate and apart from DOT regulations that apply specifically to CDL holders, the City maintains its own drug and alcohol policy that applies to all City employees. Executive Order 94 prohibits City employees from being under the influence of drugs or alcohol while performing City business. However, the Order offers City employees a second chance before mandating a dismissal: a first time drug or alcohol violation will result in lesser disciplinary action in conjunction with a Stipulation and Agreement which includes treatment and follow-up testing. Executive Order 94, Sections II. E. and G. 6; IV B. Appellant signed a Stipulation and Agreement on August 20, 2007, in conjunction with a thirty day suspension. (**Exhibit 4**).

Pursuant to the Agreement, Appellant was referred to a substance abuse professional (SAP) for education and treatment. As conditions of continued employment with the City, Appellant agreed to abide by the SAP's treatment plan, agreed to abstain from alcohol

consumption throughout the duration of the Agreement, and agreed to submit to follow-up breath, urine or blood screening at the request of the Agency for at least three years. (**Exhibits 4, 5**).

Following an evaluation by the SAP and completion of class requirements, Appellant was permitted to return to his duties as a heavy equipment operator. Between August 20, 2007, and September 18, 2008, he submitted to approximately twenty-five drug or alcohol follow-up tests. (**Transcript, 238: 12-15.**) On September 18, 2008, Appellant was called in for a follow-up alcohol test at Denver Health Medical Center. An experienced breath alcohol technician performed all required calibrations on an evidential breath testing machine (EBT) and directed Appellant to blow into a breath tube. When Appellant blew a 0.060 blood alcohol content reading, the technician showed the readout to Appellant and performed a second test 20 minutes later with identical results, which were also shown to Appellant. The tests were witnessed by Jeffrey Gonzales, Appellant's supervisor.

The EBT at Denver Health normally prints through an external printer. Several days earlier, the printer was sent out for repairs so that on September 18th, the EBT was not connected to any external print source. Because there was no printer, the technician was conducting only testing under Executive Order 94, not random testing required by DOT regulations. (**Transcript, 95:11-16; 96:1:3**). When Appellant was brought in for his follow-up test, the technician recorded by hand the two test results and a final calibration of a 0.040 solution of ethyl alcohol onto the alcohol testing form, with the following comment: "Printer not working. Results of test properly printed on this form." (**Ex. 8**). Appellant then signed the bottom of the form beneath language which read: "I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater."

Immediately following the tests, Appellant was placed on investigatory leave. A pre-disciplinary meeting was held on October 7, 2008. Appellant attended with his attorney who made a statement on his behalf. Appellant was terminated on October 9, 2008, and appealed his termination to the career service hearing office. At the hearing, Appellant did not dispute the accuracy of the two test readings, nor did he dispute the testimony of the technician or his supervisor, both of whom witnessed the tests. **Decision, p. 3**. Instead, Appellant argued that his follow-up test had to comply with the DOT regulations that govern random testing – specifically, 49 CFR § 40.253(f) and 49 CFR § 40.267(c)(4) – and under these regulations, the lack of a printer invalidated the test. The Hearing Officer agreed and reversed Appellant's termination. This appeal to the Board follows.

II. FINDINGS

The Board begins its analysis by observing that the two regulations relied upon by the Hearing Officer do not answer the question central to this appeal. Neither party disputes that 49 CFR 40.253 and 40.267 apply to the random testing that DOT requires annually on 25% (alcohol testing) and 50 % (drug testing) of the City's CDL holders. The question, however, is whether these regulations govern follow-up testing requested by the Agency under a contract agreed upon

by Appellant as a condition of continued employment with the City. The answer to this question lies in a review of other DOT regulations.

49 CFR part 383 requires the States to maintain a commercial driver's license program for drivers who operate classes of commercial motor vehicles. In this case, the Hearing Officer made a specific finding that on September 18, 2008, Appellant held a CDL and operated a commercial motor vehicle. **Decision, p. 5** CDL holders who operate commercial motor vehicles are subject to the drug and alcohol testing procedures found in 49 CFR part 382 (Controlled Substances and Alcohol Use and Testing) and 49 CFR part 40 (Procedures for Transportation Workplace Drug and Alcohol Testing Programs).

49 CFR part 382 provides in pertinent part:

§ 382.311 Follow-up testing.

The requirements for follow-up testing must be performed in accordance with 49 CFR part 40, Subpart O.

49 CFR part 40, Subpart O is entitled "Substance Abuse Professionals and the Return to Duty Process" and deals with the SAP's responsibilities with regard to evaluation, treatment, return to duty recommendations and follow-up testing plans. However, the regulations relied upon by the Hearing Officer – 40.253 and 40.267 – are contained in part 40 Subpart M and Subpart N respectively, and under § 382.311, do not apply to follow-up testing procedures.

That the DOT did not make all the provisions of part 40 applicable to follow-up testing is consistent with its policy to refrain from interfering with the conditions of employment following a positive drug or alcohol test: "The DOT grants an employer broad discretion in how to deal with an employee who tests positive for drug use." *United Food & Commercial Workers Intern. Union v. Foster Poultry Farms*, 74 F.3d 169, 171 (9th Cir. 1995); employers and employees have the right to negotiate appropriate discipline and conditions of employment following a positive test, *Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57, 65 (2000); the decision to offer a treatment plan or continue to employ a driver who has tested positive "should be left to management/driver negotiation." DOT commentary, 59 Fed.Reg. 7502 (1994).

There is nothing in the DOT regulations that would have prevented the City from terminating Appellant after he tested positive for cocaine in 2007. He remained employed only because Executive Order 94 permits the City to enter into specific contracts with employees regarding conditions of continued employment following a drug or alcohol violation. With regard to follow-up testing for CDL holders, the Order provides that the number and frequency of follow-up tests shall be directed by the substance abuse professional and shall consist of at least six tests in the first twelve months following the employee's return to work. Executive Order 94, Section II. G. 6.

Here, the substance abuse professional who evaluated Appellant ordered follow-up drug and alcohol testing that went far beyond the minimum number of tests required by Executive

Order 94: 14 tests in months 1-3; 16 tests in months 4-12; 12 tests in months 13-24; 9 tests in months 25-36, and 6 tests in months 37-48. (**Ex. 6**). Appellant's follow-up test on September 18, 2008 – more than a year after his positive test for cocaine – was not a DOT required test; rather, it was a test specifically required as a condition of continued employment with the City:

5) Regardless of whether the SAP determines a SAT program is necessary, Employee shall submit to breath, urine or blood screening at the request of the Department/Agency for at least three years. However, in accordance with the Department of Transportation (DOT) regulations, the SAP may impose follow-up testing for a period of five (5) years. Should Employee fail to comply with any part of this agreement, the treatment education plan, SAT program, after care, and/or breath/urine/blood screening requests, such failure shall be considered a violation of the terms and conditions of employment and disobedient of the order of an authorized supervisor. Such action by the Employee shall be grounds for dismissal.

(Stipulation and Agreement, Ex. 4, par. 5).

Further, Appellant's contract for continued employment with the City limited his career service appeal rights:

8) Employee agrees that, if he is disciplined for failing to comply with the terms of this agreement, the sole issue that he can raise on appeal with the Career Service Authority is whether he complied with the terms and conditions of this agreement. Employee voluntarily and knowingly waives his right to raise any other issues or defenses on appeal or to raise any other defense to the discipline.

(Stipulation and Agreement, Ex. 4, par. 8).

Thus, at the career service hearing, the Agency needed to prove only a violation of Appellant's agreement. With regard to the September 18th follow-up test, the Agency needed only to prove that the two tests performed by Technician Richard Jones were accurate in indicating a 0.06 blood alcohol content. The record contains ample evidence of the tests' accuracy, (**Transcript, 83:15-21; 91:5-19; 92:15-25; 93:1-25; 94:1-25; 104:9-16; 110:15-18; 111:16-20**), and Appellant did not dispute the accuracy of the tests, **Decision, p. 3**.

In addition, the record contains independent evidence that Appellant violated the terms of his agreement. Appellant clearly understood that he was required to abstain from any alcohol consumption throughout the duration of his Stipulation and Agreement. (**Transcript, Testimony of John Delgado, 238: 4-10; Exhibits 5 and 7**). Kelly Duffy, Director of Street Maintenance, testified that following the September 18th test, while Appellant was on investigatory leave, he called her and admitted that the night before the test he had helped his son move and that he had consumed alcohol and wanted to know what he should do. (**Transcript,**

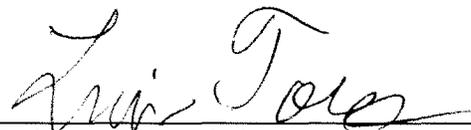
251: 5-25). In a *de novo* hearing where the only issue was whether Appellant complied with the terms of his agreement, Appellant's admission to Ms. Duffy is independent evidence that he failed to do so.

III. ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Decision, dated January 30, 2009, is **REVERSED**, and the termination of Appellant's employment by the Agency is **AFFIRMED**.

SO ORDERED by the Board on June 18, 2009, and documented this
2nd day of July, 2009.

BY THE BOARD:



Luis Toro, Co-Chair

Board Members Concurring:

Felicity O'Herron
Patti Klinge
Tom Bonner

Nita Henry did not participate in the Board's decision.