

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 75-08

DECISION

IN THE MATTER OF THE APPEAL OF:

JOHN L. DELGADO

Appellant,

vs.

DENVER DEPT. OF PUBLIC WORKS, STREET MAINTENANCE DIVISION

and the City and County of Denver, a municipal corporation,
Agency.

I. INTRODUCTION

The Appellant, John Delgado, appeals his dismissal from employment at the Department of Public Works, Street Maintenance Division (the Agency) for alleged violations of specified Career Service Rules. The Appellant seeks reinstatement, back pay, and benefits. A hearing concerning this appeal was held on December 18, 2008. The Appellant was represented by his attorney-at-law, Ferdinand L. Torres. The Agency was represented by Assistant City Attorney Franklin A. Nachman. Hearing Officer Bruce A. Plotkin presided.

Agency Exhibits 1-15, and Appellant's Exhibits A-E were admitted. Witnesses Lorraine Bockman, Richard Jones, Jeffrey Gonzales, Jan Meese, and Kelly Duffy testified for the Agency. The Appellant testified on his own behalf.

For reasons stated below, the Agency's dismissal of the Appellant must be reversed.

II. ISSUES

The following issues were presented for appeal:

1. whether the Appellant complied with the terms of his Stipulation and Agreement dated August 20, 2007.
2. Whether the Agency proved, by a preponderance of the evidence, that the Appellant violated one or more of Career Service Rules (CSR)16-60 G., J., K., V., Y., or Z;

3. if the Agency proved the Appellant violated one or more Career Service Rules, or his Stipulation and Agreement, whether the Agency's decision to dismiss the Appellant from employment complied with the directives of CSR 16-20;

III. FINDINGS

The Appellant was employed as an Equipment Operator Specialist at the Agency. Because his position requires driving heavy equipment, every Equipment Operator Specialist is required to maintain a Commercial Driver's License, or CDL. Federal Department of Transportation (DOT) regulations require CDL holders who drive heavy equipment to be tested randomly for drugs and alcohol.¹ This federal directive has been adopted in the City and County of Denver by Executive Order 94² which states, in pertinent part, "[p]ursuant to the DOT regulations, random drug testing shall be conducted annually on 50% of the average number of City commercial driver's license positions in existence." While on duty July 27, 2007, the Appellant was randomly chosen for testing. His test returned positive for cocaine.

Executive Order 94 permits a first-time offender to avoid dismissal by entering into a Stipulation and Agreement for Treatment. The Appellant signed and accepted the Agency's Stipulation and Agreement on August 20, 2007. [Exhibit 4]. The Stipulation required the Appellant to abstain from, and test for use of, alcohol and illegal drugs for a minimum of three years. [Exhibit 4-2 ¶¶5]. He was also required to report to a Substance Abuse Professional and submit to her recommendations for treatment and testing. [Id ¶¶3-4; Exhibit 4-3 ¶7]. In his Stipulation, the Appellant agreed:

8) 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.

[Exhibit 4-3].

The Appellant completed his evaluation and class requirements under his Stipulation and Agreement. He was then released to the Agency for follow-up testing for four years. [Exhibits 6, 7]. Follow-up testing, while administered through the Occupational Health and Safety Clinic at Denver Health Medical Center, must comply with federal Department of Transportation procedures.³

¹ 49 CFR 40 Subpart A § 40.1(b)

² The Mayor's Executive Order 94 (October 29, 2002), and memorandum no. 94A 10/29/2002, contain city-wide policies concerning drugs and alcohol. Executive Orders are enforced in the Career Service personnel system in the same manner as Career Service Rules. See CSR 16-60 Y.

³ 49 CFR 40 Subpart A §40.1 (a); Jones testimony].

On September 18, 2008, the Appellant was on duty, operating a road patcher⁴ when he was called in for a follow-up alcohol test. His immediate supervisor⁵ accompanied him to Denver Health Medical Center. An experienced, certified breath alcohol technician performed all required calibrations on a certified⁶ breath testing machine, known as an EBT, [see footnote 8], and filled out all required information on the DOT-mandated "Alcohol Testing Form." [Exhibit 8].⁷ When the Appellant "blew" a 0.060 blood alcohol content reading in his screening [first] test, the technician showed the readout to the Appellant. In conformance with DOT standards, the Appellant was re-tested by a confirmation test 20 minutes later with identical results.

The technician complied with the required test procedures under DOT guidelines 49 CFR 40 Subpart A, §40.253 (a) through (e), but did not comply with (f) or (g). Those two sections require the technician to show a printout of the confirmation test to the tested employee and to attach the printout to the Alcohol Testing Form. The technician testified the printer normally used to print out test results was malfunctioning at the time, so results were not printed for either the screening or confirmatory test. Instead, the technician wrote the following comment on the DOT-required Alcohol Testing Form. [49 CFR 40 Appendix G]. "Printer not working. Results of test properly printed on this form." [Exhibit 8].

The Appellant then signed at the bottom of the form beneath the pre-printed 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."

The Appellant did not dispute the accuracy of the two test readings, and testified he had no reason to dispute the accuracy of the testimony of the technician, nor of his supervisor, who witnessed both tests. [Appellant cross-exam].

A pre-disciplinary meeting was held on October 7, 2008. The Appellant attended with his attorney-at-law, Mr. Torres, who presented argument on behalf of his client. The Appellant was terminated from employment on October 9, 2008. He filed this appeal timely on October 23, 2008.

⁴ A truck used to patch pot-holes. [Appellant testimony].

⁵ The Appellant's supervisor was also a Designated Employer Representative (DER) under DOT regulations. 49 CFR 40 Subpart A, §40.3. A DER is defined as "[a]n employee authorized by the employer to take immediate action(s) to remove employees from safety-sensitive duties, or cause employees to be removed from these covered duties, and to make required decisions in the testing and evaluation processes. There was no dispute that driving a road patcher is a safety sensitive duty.

⁶ According to 49 CFR 40 SubPart K §40.231(a).

⁷ Required under 49 CFR 40 Appendix G ("The following form is the alcohol testing form required for use in the DOT alcohol testing program...").

IV. ANALYSIS

A. Introduction.

The Agency claimed this is a straightforward case of an employee whose dismissal was required when he failed a follow-up alcohol test under his Stipulation and Agreement. The Appellant replied the test was fatally flawed, pursuant to federal law, when a printer failed to print the test result, so that he must be reinstated.

For reasons explained below, I agree this case turns on the validity of the Appellant's alcohol breath test taken on September 18, 2008. Since the only issue the Appellant may raise under his Stipulation, was whether he complied, then if the test was valid, the Appellant's dismissal must be affirmed. If the test was fatally flawed, the test must be considered as if it never occurred. Without a valid test, none of the alleged Career Service Rule violations, all of which depend upon a valid result, can be proven, and the Appellant's dismissal must be reversed.

The Agency's apparently argues three reasons the Appellant's September 18, 2008 test was valid: 1. DOT regulations did not apply. 2. Even if DOT regulations applied, those regulations did not require a printed result. 3. Even if DOT regulations required a printed result, the lack of a printed result was not fatal, because there was ample indicia of the accuracy of the test. [Agency opening, closing statements]. I next consider each of these arguments in order.

B. Whether U.S. Department of Transportation (DOT) drug and alcohol testing rules applied to the Appellant's September 18, 2008 alcohol test.

The Agency argued first that, although DOT forms and procedures were used in the Appellant's alcohol breath test, the Agency conducted a non-DOT test under Executive Order 94, and was therefore not subject to DOT requirements. [Agency Opening, Closing Statements]. This issue is resolved by reference to DOT regulations.

1. The general DOT rule. The Agency may not prescribe testing regulations or standards that are inconsistent with DOT regulations. [See 49 U.S.C.A. §31306 (f)]. Federal DOT regulations apply to laboratories that conduct alcohol testing, employers of safety sensitive employees, and employees engaged in safety-sensitive transportation activities. [49 CFR 40 Subpart A § 40.1 (a),(b)]. A plain reading of the regulations makes it clear the testing laboratory where the Appellant was tested for alcohol was governed by DOT procedures. To determine whether the Agency is a "transportation employer," and whether the Appellant was an employee engaged in a "safety sensitive" activity subject to DOT testing regulations, I found those terms are defined as follows.

A "transportation employer" includes "an entity employing one or more employees...subject to DOT agency regulations requiring compliance with this part." 49 CFR 40 Subpart A. § 40.3. This somewhat circular definition makes the Agency subject to DOT testing requirements if the Appellant is also subject to them. More directly to the

Agency's point, however, the regulations specify "DOT tests must take priority and must be conducted and completed before a non-DOT test is begun." [49 CFR 40 Subpart B § 40.13 (b)]. There was no evidence that any other test was conducted. In addition, DOT regulations prohibit the use of DOT forms, as were used here, for a non-DOT test. *Id.*, at (f). Finally, and most persuasively, the Agency may not prescribe testing standards that differ from, or are inconsistent with, the DOT regulations. [49. U.S.C.A. § 31306(g)]. This federal preemption becomes important in the discussion, below, whether the failure to print the Appellant's test result was a fatal flaw.

Employees subject to DOT drug and alcohol testing regulations include those "currently performing safety-sensitive functions designated in DOT agency regulations." 49 CFR 40 SubPart A. § 40.3. Unfortunately "safety-sensitive" functions are not contained in the definitions section of the testing regulations, however, both parties acknowledged the Appellant's assignment to a road patcher was a safety sensitive function at the time he was called in for testing on September 18, 2008. In addition, interpretive guidance for the DOT regulations make it clear that an employee is subject to DOT drug and alcohol testing regulations if two conditions are met: the employee has a CDL and the employee drives a commercial motor vehicle.

<http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.asp?chunkKey=0901633480023218>.

DOT defines a commercial motor vehicle as one weighing 26,0001 pounds or more. In response to my questions about his license and road patcher, the Appellant testified he held a CDL on September 18, 2008, and that a road patcher weighs 30,000 pounds. These facts, coupled with the regulations above, establish that the Appellant was subject to DOT test requirements.

2. Exceptions to the general DOT rule. The regulations state that, in order to test outside DOT requirements, the Agency would first have to apply for an exemption. [49 CFR 40 SubPart B. § 40.7 (a)]. First, there was no evidence that the Agency sought or even desired such an exemption. Second, an exemption would be granted only for exceptional circumstances that make compliance with DOT regulations impractical. *Id.* There was no evidence that such exceptional circumstances existed in this case. Third, there was no evidence DOT issued an exemption in writing as required under the regulations. [49 CFR 40 SubPart B § 40.7 (d)]. Without such an exemption, the Agency was subject to DOT alcohol testing requirements.

3. Executive Order 94. The Agency also argued the Appellant's test was not subject to DOT requirements because it was conducted under Executive Order 94. First, as stated above, DOT requirements would usurp any contrary requirements under Executive Order 94.⁸ Second, Executive Order 94, by its own terms, applies DOT testing standards. "For those positions requiring a CDL, the City shall implement drug

⁸ Any possible preemption issue is resolved by specific language at 49 CFR § 382.109. "...this part preempts any State or local law to the extent that (a)(1) Compliance with both the State or local requirement in this part is not possible; or (a)(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part" The provision goes on to state that state criminal law is not preempted.

testing pursuant to applicable DOT regulations..." [Executive Order 94, Section II. G].

C. Whether DOT regulations require a printed test result.

Having established that DOT regulations apply to the Appellant's September 18, 2008 follow-up alcohol test, the next determination is whether DOT regulations required a printed test result. The following DOT regulations apply.

49 CFR 40 Subpart K § 40.231. What devices are used to conduct alcohol confirmation tests?

(b) To conduct a confirmation test, you must use an EBT⁹ that has the following capabilities:

(1) Provides a printed triplicate result (or three consecutive identical copies of a result) of each breath test;

This regulation makes it clear the testing device must either contain an internal printer, or be connected to an external printer which produces three copies of each confirmation test result. The Appellant's test produced no printed result, in violation of this DOT regulation.

D. Whether the failure to print Appellant's alcohol test result was a fatal flaw requiring annulment of the test.

The question that follows is, having established that a printed result is required, what are the consequences of the failure to print the Appellant's test result on September 18, 2008? The answer is found in the following DOT regulations.

49 CFR 40 Subpart N §40.267. What problems always cause an alcohol test to be cancelled?

As an employer, A BAT [Breath Alcohol Technician],¹⁰ or an STT [Screening Test Technician],³ you must cancel an alcohol test if any of the following problems occur. These are "fatal flaws." You must inform the DER [Designated Employer Representative] that the test was cancelled and must be treated as if the test never occurred.

⁹ An EBT [Evidential Breath Testing Device] is defined as "[a] device approved by [the National Highway and Traffic Safety Administration] NHTSA for the evidential testing of breath at the .02 and .04 alcohol concentrations, placed on NHTSA's Conforming Products List (CPL) for "Evidential Breath Measurement Devices" and identified on the CPL as conforming with the model specifications available from NHTSA's Traffic Safety Program." 49 CFR 40 SubPart A §40.3

¹⁰ A person who instructs and assists employees in the alcohol testing process and operates an Evidential Breath Testing device.

These problems are...

(c) In the case of a confirmation test...

(4) The EBT [Evidential Breath Testing Device]¹¹ does not print the result (see §40.253(f))...

49 CFR 40 Subpart M § 40.253 (f). You must show the employee the result and unique test number that the EBT prints out either directly onto the ATF or onto a separate printout.

[49 CFR 40 SubPart K, §40.235, *citing* 65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001].

These DOT regulations make clear that the failure to produce a printed copy of the test results requires nullification of the test. Neither the technician's handwritten entry, nor the Appellant's signature acknowledging the test result can rehabilitate the fatal flaw. The test must, consequently, be treated as if it never occurred. [49 CFR 40 Subpart N §40.267]. The technician even acknowledged that the failure to print the Appellant's test result required cancellation of the test under DOT regulations. [Jones cross-exam].

The Agency's final argument was that, even if a printed test result is required under DOT regulations, all indicia of a reliable result were present. Even where an employee's positive test for alcohol is accurate, it is inescapably compulsory, under U.S. DOT regulations, that the test must be cancelled and the result must be ignored if the result was not printed. For this and reasons stated above, the Agency's argument, that a printed result is not required, is not supported by the DOT regulations which are mandatorily applied to the present case.

E. Career Service Rule Violations alleged by the Agency.

1. CSR 16-60 The following may be cause for either discipline or dismissal of a Career Service employee:

¹¹ An Evidential Breath Testing Device [EBT] is defined as "[a] device approved by [the National Highway and Traffic Safety Administration] NHTSA for the evidential testing of breath at the .02 and .04 alcohol concentrations, placed on NHTSA's Conforming Products List (CPL) for "Evidential Breath Measurement Devices" and identified on the CPL as conforming with the model specifications available from NHTSA's Traffic Safety Program." 49 CFR 40 SubPart A §40.3

CSR16-60 G.

1. Being under the influence, subject to the effects of, or impaired by alcohol...while on duty.

The Agency's only proof of this violation was the Appellant's follow-up test on September 18, 2008. Because that test must be considered as never having occurred, the Agency failed to prove this violation by a preponderance of the evidence.

2. Consumption of alcohol...while on duty.

The Agency conceded the Appellant exhibited no visible or other indicia of having consumed alcohol on September 18, 2008. [Gonzales testimony]. The only remaining basis for finding the Appellant violated this rule was his test on September 18, 2008. Because the test must be considered as never having occurred, the Agency failed to prove this violation by a preponderance of the evidence.

2. CSR16-60 J. Failing to comply with the lawful orders of an authorized supervisor...

A violation of the first part of this rule is established by proof that (1) a supervisor communicated a reasonable order to a subordinate, (2) proof the subordinate violated the order (3) under circumstances demonstrating willfulness. In re Mounjim, CSA 87-07, 7 (7/10/08), affirmed In re Mounjim, CSB 87-07 A., 3 (1/8/09). The Agency did not state what direct order was violated. Assuming the Appellant's Stipulation and Agreement was an order, the Appellant's alcohol test, now considered a nullity, may not be considered evidence the Appellant violated that order. It is not apparent from the record that any other evidence could establish a violation of this rule. The Agency therefore failed to prove the Appellant violated this rule.

3. CSR16-60 K. Failing to meet established standards of performance...

The Agency claimed the Appellant failed to meet the following city-wide STARS goals in his annual performance review.

- a. Accountability and Ethics: Contributes to maintaining the integrity of the organization; Displays high standards of ethical conduct and understands the impact of violating these standards on an organization, self, and others; Remains trustworthy;

BASELINE DUTY

Employee accepts personal responsibility for [his] actions, decisions, and behaviors; ensuring performance contributes to the standards and goals of the City and County of Denver, Mayor, Public Works, organization and work section as a whole.

Displays high standard of conduct.

SAFETY

BASELINE DUTY

Takes personal responsibility for workplace safety...

Section III –JOB DUTIES

...Safety...Maintains a safe working environment by following departmental safety rules. Standards – Follows city, departmental and agency's safety rules and safe operating procedures at all times...

Rules and Regulations: Follows all city, departmental and agency rules and regulations and documented policies and procedures.

It is apparent the last statement refers, at least in part, to Executive Order 94. The Agency did not state what evidence tended to establish a violation of the other standards, above. Assuming the Appellant's Stipulation and Agreement was such as standard, the Appellant's alcohol test, now considered a nullity, may not be considered evidence the Appellant violated Executive Order 94 or the other specified standards. There is no other evidence in the record that established a violation of any of these standards. The Agency therefore failed to prove the Appellant violated any of these standards under CSR 16-60 K.

4. CSR16-60 V. Failure to use safety devices or failure to observe safety regulations which: results in injury to self or others; jeopardizes the safety of self or others; or results in damage or destruction of City property.

The Agency failed to cite any safety device the Appellant failed to use, and failed to cite a safety regulation the Appellant failed to observe. If Executive Order 94 could be considered a safety regulation, the only evidence of the Appellant's violation of it was his alcohol test, now deemed a nullity. Thus, the Agency failed to prove the Appellant violated this rule.

5. CSR16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.

This rule serves two functions. It serves as a catchall provision for wrongdoing, under the Career Service Rules, which an agency did not specify elsewhere in its notice of discipline. In addition, CSR 16-60 Y bootstraps notice of wrongdoing, under other authority, into the Career Service Rules. In re Sawyer and Sproul, CSA 33-08, 34-08 (1/27/09).

The evidence does not suggest the Appellant violated a Career Service Rule not already cited by the Agency. As for violations based upon other authority, the Agency claimed the Appellant violated Executive Order 94, the city's alcohol and drug policy by: consuming, or being under the influence, of alcohol while performing City business, or

while driving a City vehicle; violating his Stipulation and Agreement; and by violating Executive Order 94 for a second time.

The Agency's only proof for each of these violations was the Appellant's follow-up test on September 18, 2008. Because that test must be considered as never having occurred, the Agency failed to prove this violation by a preponderance of the evidence.

6. CSR16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

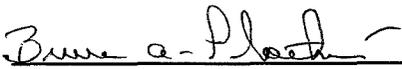
The Agency failed to present evidence the Appellant violated this rule.

In the absence of a valid alcohol test, the Agency failed to prove the Appellant violated his Stipulation and Agreement, or any Career Service Rule. Where an agency fails to prove any violation it has alleged as a basis for discipline, the discipline must be reversed. The remaining issues in this case are moot.

V. ORDER

The Agency's termination of the Appellant's employment on October 9, 2008 is **REVERSED**. The Agency is ordered to reinstate the Appellant, and to restore pay and benefits which are reinstated from the date of the Appellant's dismissal. The Appellant's personnel record shall be amended accordingly, removing references to this dismissal.

DONE January 30, 2009.


Bruce A. Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with CSR 19-60, within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career-service-rules).

All petitions for review must be filed by mail or by hand delivery to:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

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