CAREER SERVICE BOARD

CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 32-12A

IN THE MATTER OF THE APPEAL OF:

ARTHUR BELL, JR.,

Respondent-Appellant,

vs.

DEPARTMENT OF SAFETY PUBLIC WORKS,

And the City and County of Denver, a municipal corporation,

Petitioner-Agency.

ORDER ON PETITION FOR REVIEW

Arthur Bell was an Equipment Operator for Denver's Department of Public Works (Agency). His job required him to drive a U.S. Department of Transportation (DOT) regulated truck. On December 7, 2009, he was randomly selected to undergo a drug test. He tested positive for marijuana.

While the City could have chosen to seek Mr. Bell's discharge at that a time, in accordance with the City's Executive Order 94, Mr. Bell was given the option of accepting a thirty-day suspension and entering into what is known as a Stipulation and Agreement (Agreement), wherein Mr. Bell would agree, *inter alia*, to undergo drug treatment or classes, agree to refrain from use of illegal substances, agree to be subjected to random testing upon his return to the workplace, and waive certain rights afforded him under Career Service Rules. On or about January 6, 2010, Mr. Bell agreed to the terms of the Agreement and executed the document. The Agreement would be in effect for at least three years.

On June 14, Mr. Bell was subjected to a drug test per the Stipulation and Agreement. It came back positive for marijuana. As a result of the positive test, the Agency deemed Mr. Bell in violation of the Agreement and discharged him from employment. Mr. Bell appealed his discharge to a hearing officer. Based primarily on the Agency's inability to prove that Mr. Bell's drug test was positive in accordance with DOT regulations, the Hearing Officer reversed the Agency's discharge of Mr. Bell. Because we have ruled previously[1] and continue to believe that drug tests conducted pursuant to a

[1] In the Matter of the Appeal of John Delgado and the Department of Public Works, 75-08A

Stipulation and Agreement need not conform to the DOT regulations, we reverse the Hearing Officer and re-impose the discipline of discharge on Mr. Bell.

We first note that the Hearing Officer, in her decision, has misapprehended the issue(s) before her. She determined those issues to be: 1) whether the Agency proved by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules; and 2) whether the Agency proved that termination was within the range of penalties that could be imposed for the proven misconduct. But these were not the issues presented for her consideration. Rather, pursuant to the clear terms of the Stipulation and Agreement, the only issue before the Hearing Officer that could have been "raised on appeal is whether employee complied with the terms and conditions of the agreement. All other issues and defenses to the discipline are expressly waived." (Agreement, par.8) Indeed, even the issue of appropriate punishment had been agreed to by the parties. Per paragraph 5 of the Agreement, if Mr. Bell is found to have violated the Agreement, then that constitutes cause for dismissal.

On page 4 of her decision, the Hearing Officer noted that Mr. Bell tested positive for marijuana at a level of 35 ng/mL . She further noted that this level was below DOT levels for an initial positive result, but above DOT levels for a positive confirming test. She then reasoned that this appeal hinged on whether the results were from an initial or a confirmatory test. We disagree. The Hearing Officer's task was not to determine whether Mr. Bell tested at a level sufficient to support a positive finding under DOT regulations. Instead, the only task for the Hearing Officer was to determine if Mr. Bell violated his Agreement. The Agreement prohibited Mr. Bell's use of all illegal substances, including marijuana (par.5). The Agreement did not proscribe marijuana use - as long as it was below a certain level; it prohibited all use. Consequently, it does not matter for purposes of determining whether the Agreement was violated, whether Mr. Bell tested positive for marijuana use at a 50 ng/mL level, a 35 ng/mL level, or a 15 ng/mL level.[2] The salient point is that he tested positive for marijuana in his system. He used marijuana and that violated the specific terms of the Stipulation and Agreement.

At page 6 of her decision, the Hearing Officer finds that the drug test did not comport with DOT requirements. Again, we find this irrelevant because the test in question was not performed in furtherance of a DOT mandate, regulation, or other requirement. It was conducted to determine whether Mr. Bell was in compliance with the terms of his Agreement. Accordingly, the failure of the tests to strictly comport with DOT procedural guidelines is immaterial.

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[2] In any event, the record appears to us to prove conclusively that the 35 ng/mL finding was based on a confirmatory test and not an initial test, thereby resulting in a "positive" test even under DOT regulations. Though different witnesses with varying degrees of familiarity with the process expressed slightly differing opinions, the unrebutted testimony of Marcel Linne, Safety Director for the Department of Public Works, testified that if the initial test comes back with a finding for marijuana at a level below 50 ng/mL, it is considered a "negative" and is not reported. The matter is over - no confirmatory tests of negative findings are taken. The only way a finding of 35 ng/mL could be reported as a positive is if the initial test came back at a level higher than 50 ng/mL, Then and only then would a confirmatory test be done, which, in this case, resulted in a confirmation finding of 35 ng/mL. (Transcript, pp. 25:7-16; 26:21-23)

In any event, the DOT shortcomings described by the Hearing Officer (failure for the test to be observed and failure to promptly notify Mr. Bell that he could have a split sample tested) simply do not impugn the integrity of the test or the accuracy of the test results. First, we do not see how the failure to have the test observed calls into question the validity of the test results. Plainly, the purpose of the "observation" requirement is to deter individuals being tested from being able to alter or adulterate samples or provide samples that may not be their own. We do not believe Mr. Bell was in any way prejudiced because he was not observed giving his urine sample. [3]

Similarly, Mr. Bell was not prejudiced by not being promptly advised of the opportunity to have a split sample tested. The record demonstrates that Mr. Bell vaguely remembered a conversation after learning of the positive test results in which he was informed that he could get the split sample tested (Transcript, p. 66:5-10). There is nothing in the record to indicate that Mr. Bell requested that the split sample be tested. More important, however, is the undisputed testimony offered by Dr. Lorna Szczukowski that the split sample is maintained for quite some time; and that failure to notify an employee of the right to have the split sample tested is not considered by DOT to be a fatal flaw in the testing because it is correctible (Transcript pp. 106:16-107:3). If Mr. Bell believed that the test of the split sample would have demonstrated the first test results to be faulty, he had the opportunity, up to the date of the hearing, to have that split sample tested (Transcript, p. 116:8-11)and the results introduced into evidence at his hearing. He did not have the available split sample tested, but that was his choice.

The Hearing Officer also found it significant that Mr. Bell had taken drug tests before and after the test which resulted in the positive finding and that these tests came back negative. But we do not see, either logically, or medically, how this vitiates the results of the one test that did come back positive. The Hearing Officer, to support her erroneous conclusion, essentially cherry-picks the testimony offered by Dr. Kluck. While he did testify that marijuana may stay in a person's system for several weeks, he also testified, without contradiction or impeachment, that marijuana could stay in a person's system for only hours (Transcript, pp. 129:22-130:5). In other words, according to the unrebutted testimony of Dr. Kluck, there is nothing medically inconsistent or incongruous about a positive test being sandwiched between several negative tests. The negative tests both prior and subsequent to the positive test do not medically disprove the accuracy of the positive test results.

In sum, we agree with the Agency that the Hearing Officer misinterpreted CSR 16-60Y[4] as it might pertain to Executive Order 94 when she determined that drug tests conducted as a result of a Stipulation and Agreement must conform to the same DOT regulations as random tests conducted for the maintenance of an employee's Commercial Drivers License. We also believe that the Hearing Officer's decision runs counter to our own precedent where we have determined that drug tests conducted as a result of a stipulation and Agreement need not conform to DOT standards. Because

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[3] Even DOT does not consider the failure to observe a test as a "fatal flaw" which would invalidate the results of the test. See, 49 C.F.R. § 40.209 (b)(6).

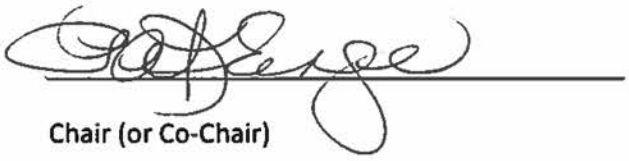
[4] Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.

employees on a Stipulation and Agreement have been afforded a second chance, and have knowingly and voluntarily waived certain rights and accepted certain responsibilities in order to keep their jobs, the Hearing Officer's discarding of the plain language of the Stipulation and Agreement, as well as a positive drug test (the accuracy of which was not medically or scientifically impugned), sets poor policy precedent which we cannot allow to stand.

Therefore, for all of the above-stated reasons, we REVERSE the decision of the Hearing Officer and order the re-instatement of the discipline originally imposed by the Agency. Mr. Bell, after testing positive for marijuana in 2009 and agreeing that he would not use marijuana for three years or suffer the punishment of discharge, tested positive for marijuana in 2012. Consequently, he is discharged from his employment with the City and County of Denver.

SO ORDERED by the Board on April 18, 2013, and documented this 3rd day of October, 2013.

BY THE BOARD:



Chair (or Co-Chair)

Board Members Concurring:

Colleen M. Rea, Esq.

Patti Klinge

Michelle Lucero, Esq.

Derrick Fuller

Bob Nogueira