HEARINGS OFFICER, CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal No. 69-04.

DECISION

IN THE MATTER OF THE APPEAL OF

RUBEN GOMEZ, Appellant,

vs.

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

I. PROCEDURAL FACTS

The Appellant, Ruben L. Gomez, appeals his dismissal from the Department of Public Works, Street Maintenance Division (Agency). On April 23, 2004, the Agency notified the Appellant pursuant to Career Service Rule (CSR) 16-30, that it contemplated disciplinary action against him for alleged misconduct. A pre-disciplinary hearing was conducted on May 3, 2004. The Appellant was represented by counsel. Following that meeting, the Agency notified the Appellant on May 7, 2004 that he was dismissed from his position. This appeal followed on May 14, 2004.

The hearing concerning these appeals was held on September 17, 2004, before Hearing Officer Bruce A. Plotkin. The Appellant was represented by Richard Gross, Esq. The Agency was represented by Mindi Wright, Esq., with Ms. Jan Meese serving as the Agency's advisory witness.

Agency exhibits numbered 1-5, and 8-14 were admitted without objection. Agency exhibits numbered 6, 7, 15 and 16 were admitted over the Appellant's objection. Appellant offered no additional exhibits.

The Agency presented the following witnesses: Mr. Richard Jones, Dr. Stephen Hessl, Mr. Robert Streno, and Mr. Daniel Roberts. The Appellant testified on his own behalf with no other witnesses.

II. ISSUES

The following issues were presented for appeal:

1. Has the Appellant stated a claim upon which the Hearings Officer has jurisdiction to grant relief?

2. Did the Appellant violate CSR 16-50 A. 3), 4), 7), 14) or 18); CSR 16-51 A. 5), 10), or 11); Executive Order #94; or Public Works Policies and Rules.

3. If the Appellant violated any of the above referenced Career Service rules or Department regulations, was the Agency justified in dismissing the Appellant?

III. FINDINGS AND ANALYSIS

1. Background

The Appellant was a heavy equipment operator for the Street Maintenance Division of the Department of Public Works. The U.S. Department of Transportation (DOT), Omnibus Transportation Employee Testing Act, requires random drug and alcohol testing for all commercial motor vehicle drivers such as the Appellant. The Appellant attended training regarding these regulations on April 3, 1995.

On April 16, 2004, the Appellant's name was randomly selected by the Occupational Health and Safety Clinic (OHSC) for testing. At approximately 9:15 a.m., while the Appellant was operating a Motor Grader, his immediate supervisor, Bob Streno, informed the Appellant he was required to report to the OHSC for a random drug and alcohol test. At approximately 10:50 a.m. the Appellant provided a urine specimen at OHSC. The Appellant was in a closed bathroom and not observed while providing this specimen. Then, in the presence of the Appellant and his supervisor, Technician Richard E. Jones (Jones) divided the specimen into two separate containers, labeled and sealed them. Each "split" was signed by the Appellant. The parties then signed chain of custody papers. Jones attached them to the specimen and sent the entire package via overnight carrier to a testing laboratory. The chain of custody papers were signed at each transfer of the specimen between the clinic and the laboratory. [Exhibit 5].

Immediately after the Appellant provided his urine specimen, Jones measured the temperature of the specimen in accordance with DOT requirements, and found it was below the acceptable range of 90-100 degrees F.

Jones informed the Appellant he would have to provide another specimen under direct observation, in accordance with DOT testing requirements.

In the waiting area, Streno instructed the Appellant to drink some water. The Appellant said he needed to make a phone call. Streno followed the Appellant and observed, but did not listen to the call. They returned to the waiting area where the Appellant drank some more water. Approximately fifteen minutes later, the Appellant again asked to use the telephone. Streno remained behind momentarily, then searched for the Appellant who was not at the telephone. He observed the Appellant enter a nearby bathroom where the Appellant locked the door. Streno banged on the bathroom door and yelled "you lied to me," and that the Appellant should have asked to go to the bathroom. Streno demanded the Appellant open the door. After some forty-five seconds, the Appellant opened the door. The toilet was running and the Appellant was wiping his hands. Streno escorted the Appellant back to the waiting area.

At approximately 1:00 p.m. Jones observed the Appellant provide a second urine specimen. The second specimen was divided, placed in two separate containers, and sealed in the same fashion as the first specimen. The Appellant then returned to his driving duties that same day.

On April 22, 2004, the Street Maintenance Division was notified from OHSC the Appellant's first test was positive for cocaine and the second test was determined to be "specimen substituted." DOT defines a substituted specimen as any substance incompatible with human urine, and deems such a result to be a refusal to test. The Medical Review Officer (MRO) for OHSC, Dr. Stephen M. Hessl, spoke with the Appellant and concluded there was no medical explanation for the Appellant's substituted specimen. The Appellant was then placed on investigatory leave that same day.

On May 3, 2004, a pre-disciplinary meeting was held. The Appellant attended with his attorney, Richard Gross. The Appellant provided a statement and on May 5, 2004, submitted an additional written statement.

At the Appellant's request, OHSC sent the second container from the first test to a second laboratory for testing. The second laboratory confirmed the specimen was positive for cocaine.

On May 7, 2004, the Agency sent the Appellant notification of his dismissal. The dismissal was approved by Daniel Roberts, Acting Director, Street Maintenance Division, Department of Public Works. The Appellant filed his appeal on May 14, 2004.

IV. DISCUSSION

A. Jurisdiction

The Appeal of the Appellant's termination, under the Career Service Rules cited by the Agency, is a proper matter for consideration. The Appellant timely filed his appeal. The Hearing Officer finds both subject matter jurisdiction and personal jurisdiction are properly before him.

B. CSR 16-50 A. 3) Dishonesty, including but not limited to...lying to superiors....

The Agency witness Robert Streno (Streno) is the Operations Supervisor for the Department of Public Works, Street Maintenance Division. In that capacity he supervised the Appellant. Streno testified at hearing that on April 16, 2004, while he was waiting with the Appellant in the OSHC waiting area for drug and alcohol testing, the Appellant asked to use the telephone twice. The second time, the Appellant was out of Streno's sight momentarily. Streno became suspicious, and followed the Appellant who was not at the telephone or in the area. He saw the Appellant enter a bathroom in an adjacent hallway, and heard the door lock. He pounded on the door, yelling "you lied to me," and demanded to be let in. Steno testified the Appellant was out of sight a total of one to two minutes. When the Appellant unlocked the bathroom door, Streno saw the toilet running and the Appellant wiping his hands. [Streno testimony].

The Appellant did not contest Streno's recollection of the incident. He only explained that he barely had time to sit when Streno banged on the door. [Appellant testimony]. When asked if he lied to Streno about going to the bathroom, the Appellant answered, somewhat indirectly, "he knew I had to go [the bathroom]". [Appellant testimony].

Under most circumstances, an employee's stating he was going to make a phone call, then proceeding to the bathroom without ever stopping to make the call would not be a significant violation. Under the circumstances of this case the consequences are important.

In 1995, following a random DOT drug test, the Appellant tested positive for cocaine. [Testimony of Daniel Roberts]. He entered into a "Stipulation and Agreement" in lieu of dismissal, in which he admitted cocaine use. [Exhibit 14]. Under Executive Order #94, the "City and County of Denver Employee's Alcohol and Drug Policy" [Exhibit 11], a first violation permits an employee, found to have a positive drug test, to enter into a stipulation in lieu of dismissal; however a second positive test at any time while in city employ requires termination under the Executive Order. [Exhibit 11, p.12-13]. The Appellant was familiar with Executive Order #94 requirements. He admitted receiving training in Executive Order #94 in 1995, 1999, and most recently, in February 2003. [Cross

examination of Appellant, Exhibits 8, 9, and 10]. Under the terms of his Stipulation in 1995, he was randomly tested twelve times [Appellant testimony], and tested numerous times since then, under DOT regulations for random testing. *Id.* Thus he was familiar with testing procedures, including the knowledge that a supervisor must always be present during testing, to insure compliance.

In summary, these were the circumstances important to the alleged violation: the Appellant already had one strike out of a two-strikes-and-you're-out policy in drug testing; he had ample experience with the testing process to know the importance of maintaining the transparency of the proceedings; knowing he was about to be re-tested, the Appellant said he was going to use the telephone and immediately disappeared into the bathroom, unsupervised, following which he provided a specimen deemed "substituted." Given these circumstances, the incorrect information supplied by the Appellant to his supervisor constitutes a violation of 16-50 A. 3) by a preponderance of the evidence.

C. CSR 16-50 A. 4) Being under the influence, subject to the effects of, or impaired by alcohol or an illegal drug: while on duty...while operating city/agency vehicle or equipment...."

The Agency found the Appellant in violation of this rule when the results of his first specimen returned positive for cocaine. The Agency concluded since the Appellant was driving heavy equipment immediately before and after his positive drug test, that the Appellant was either under the influence or subject to the effects of cocaine while on duty, in violation of CSR 16-50 A. 4). [Roberts testimony].

In further support of this contention, the Agency presented the testimony of Dr. Hessl (Hessl), who the Hearing Officer certified as an expert in drug and alcohol screening and review. Hessl is the Director of Occupational Health for the Denver Health and Hospitals Authority. In that capacity, he oversees two clinics, including the aforementioned OHSC clinic. He is also the designated Medical Review Officer (MRO) for DOT-regulated drug and alcohol testing. As the MRO, Hessl reviews drug and alcohol testing procedure in the clinics and reviews each positive result, including the Appellant's positive test for cocaine. [Hessl testimony]. If the laboratory finds a specimen is positive Hessl then interviews the subject to determine if there is a medical reason that would justify the positive test, for example, if the subject is taking a medicine containing cocaine metabolite. [Hessl testimony]. Hessl interviewed the Appellant following his positive test result and concluded there was no medical reason justifying the positive test result for cocaine. [Hessl testimony]. He also testified that a test for cocaine is determined to be positive when the testing laboratory measures 150 nanograms (ng) of cocaine metabolite in the specimen. *Id.* According to Executive Order #94, an employee is "subject to the effects of an illegal drug"

when tested positive at 150 ng of cocaine metabolite. [Exhibit 11, p.17]. He also testified the half-life of cocaine is generally ten to twelve hours.

In response, the Appellant questioned Hessl about the reliability of the test results. Hessl replied while there may be some small percentage of error, he doubted that was the case here because (1) two separate laboratories confirmed the positive cocaine test from the same, split sample; (2) the samples are sealed and initialed by the employee to avoid any intentional or unintentional tampering; (3) proficiency in testing both at the clinic and at the laboratory is governed by federal regulations; (4) testing of the first specimen, even though the temperature was out of range, is mandated by DOT regulations; (5) the presence of cocaine metabolite is not affected by the temperature of the specimen. [Hessl testimony].

The Hearing Officer finds as follows. The Appellant tested positive for cocaine on April 16, 2004 at 10:50 a.m. [Exhibit 4], within approximately one and one half hours after operating heavy equipment for the city. He operated heavy equipment on duty again, shortly after his positive test. The effects of cocaine generally lasts for ten to twelve hours (the half-life) and the Appellant was operating equipment both before and after his positive test, well within ten to twelve hours of testing positive for cocaine. The testing procedures are reliable by a preponderance of the evidence. The Hearing Officer therefore concludes the Agency has proven, by a preponderance of the evidence, that the Appellant was in violation of CSR 16-50 A. 4).

D. CSR 16-50 A. 7) Refusing to comply with the orders of an authorized supervisor....

Daniel Roberts (Roberts) is the Director of Public Works, Street Maintenance Division. He was the Appellant's second-level supervisor. Roberts testified he found the Appellant in violation of this rule twice: first, that Jones and Streno both instructed the Appellant regarding testing procedures and the Appellant violated those procedures; secondly, the Appellant's violation of department rules, here Executive Order #94, was considered a refusal to comply with the orders of a supervisor. [Roberts testimony].

The Hearing Officer disagrees. Neither Jones nor Streno testified he instructed the Appellant to remain within sight at all times. Jones stated it is up to the supervisor to do so, [Jones testimony], and Streno was silent on the subject. Also, there is no evidence to support the proposition that a violation of a department rule equates with a refusal to comply with a supervisor.

On the other hand, the Appellant admitted receiving training in Executive Order #94 in 1995, 1999, and most recently in February 2003. [Cross examination of Appellant, Exhibits 8, 9, and 10]. In addition, he was randomly tested twelve times [Appellant testimony], plus numerous times since then, under DOT regulations for random testing, *id.* The Appellant was aware he needed to

seek permission to use the telephone from his supervisor, as he asked twice to do so. That history, combined with the Appellant's seeking to use the telephone, then, knowing he was about to be tested for drug use, disappearing furtively into a bathroom without supervision, plainly indicates he understood his actions were impermissible. The Appellant offered no justification for his actions. The Hearing Officer therefore imputes an on-going requirement to seek permission from his supervisor before using the bathroom while awaiting a random drug test. His failure to inform his supervisor under these circumstances indicates a willful refusal to comply with testing regulations. Therefore, the Hearing Officer finds the Appellant was in violation of CSR 16-50 A. 7) by a preponderance of the evidence.

E. CSR 16-50 A. 14) Failure to ...observe safety regulations which...jeopardizes the safety of self or others....

The Appellant admitted he received and reviewed a copy of the Public Works Department Policies and Rules Handbook, Exhibit 12, 13 [Appellant cross-examination]. That document states "[e]mployees are required to comply with all Department of Transportation (DOT) regulations, Executive Orders...," [Exhibit 13], and "it is prohibited for any City employee to use, be under the influence or subject to the effects of ... an illegal drug" [Exhibit 12].

Hessl testified the Appellant tested positive for cocaine on April 16, 2004. [Exhibit 6, Hessl testimony]. That test was conducted at approximately 10:50 a.m. [Exhibits 3, 4]. The Appellant was driving heavy equipment on Denver streets within one and one half hours before that positive test and drove the same heavy equipment again shortly after that positive test. Hessl testified the half-life of cocaine is approximately ten to twelve hours. It is therefore reasonable to infer the Appellant was subject to the effects of the illegal drug cocaine while operating heavy equipment on Denver city streets, in violation of Public Works Department rules.

The Appellant's testimony concerning the unreliability of the testing procedures is unconvincing. Hessl testified as to the redundant verification of the positive test and tightly-regulated procedures followed when testing under DOT regulations. The Hearing Officer concludes the Appellant was in violation of CSR 16-50 A. 14) by a preponderance of the evidence.

E. CSR 16-50 A. 18) Conduct which violates an executive order.

Executive Order #94 applies to all City of Denver workers. [Exhibit 11]. The Appellant affirmed he received a copy of that order and training in its application. [Exhibit 8]. Roberts concluded the Appellant violated this rule because the Appellant tested positive for an illegal substance, and that his second test was deemed "substituted," both violations of Executive Order #94. [Roberts testimony].

As above, the Appellant responded by questioning the reliability of the testing procedures and results. The Hearing Officer has already found the Appellant's challenge to be without merit. Therefore, because the Appellant's tests both violated Executive Order #94, the Agency has proven, by a preponderance of the evidence, the Appellant is in violation of CSR 16-50 A. 18). This is the Appellant's second violation of Executive Order #94 which states termination is mandatory for a second violation. [Exhibit 11].

F. CSR 16-51 A. 5). Failure to observe department regulations.

The Appellant admitted he received and reviewed a copy of the Public Works Department Policies and Rules Handbook, Exhibits 12, 13. [Appellant cross-examination]. That document states "[e]mployees are required to comply with all Department of Transportation (DOT) regulations, Executive Orders..." [Exhibit 13], and "it is prohibited for any City employee to use, be under the influence or subject to the effects of... an illegal drug" [Exhibit 12].

Roberts testified he sustained this violation because the Appellant violated the Department of Public Works Policies and Rules, Exhibit 9, receipt of which was acknowledged by the Appellant. [Roberts testimony]. Those Policies and Rules specifically adopt Executive Order #94, [Exhibit 9], which the Hearing Officer has already found the Appellant violated, above. *See* discussion, *supra*. Roberts also testified he sustained this violation because the Appellant was required, and failed, to maintain a safe working environment, because, his test results indicate he was subject to the influence of cocaine while driving, in violation of the Department's Workplace Safety Regulations, Exhibit 13. [Roberts testimony].

The Appellant responded by declaring his accident-free history, lack of traffic citations, and lack of visible, contemporaneous evidence that he was subject to the effects of cocaine while at work. The Hearing Officer has already found the test results to be convincing by a preponderance of the evidence, and finds the lack of visible evidence unconvincing, as two, independent test results, both positive for cocaine, speak for themselves. Moreover, the Hearing Officer finds the Appellant's positive test, indicating a level of cocaine at or exceeding 150 ng cocaine metabolite, subjected him to its effects according to Executive Order #94. [Exhibit 11, p.17]. As the Appellant was subject to the effects of cocaine in violation of the above-stated departmental regulations, he was in violation of CSR 16-51 A. 5), by a preponderance of the evidence.

G. CSR 16-51 A. 10). Failure to comply with the instructions of an authorized supervisor.

The same discussion which applied, above, to Appellant's violation of CSR 16-50 A. 7), refusing to comply with the orders of an authorized supervisor,

applies here. The distinction between CSR 16-50 A. 7) and this rule is that a failure to comply does not require a finding of an intent to refuse as in CSR 16-50 A. 7). See In re Trujillo, #28-04. As the Appellant failed to ask permission to use the bathroom which violated testing procedures as required by regulations in which he was trained, the Hearing Officer finds the Appellant is in violation of CSR 16-51 A. 5) by a preponderance of the evidence.

H. CSR 16-51 A. 11) Conduct not specifically identified herein may also be cause for progressive discipline.

As the Appellant's conduct which violated Career Service Rules was specifically identified previously, the Hearing Officer finds this violation is superfluous, and therefore dismissed.

DECISION

Based on the finding of fact and conclusions of law, above, the Hearing Officer, pursuant to CSR 19-27, AFFIRMS the Agency's termination of the Appellant.

DONE this 29th day of September, 2004.

Bruce A. Plotkin
Hearing Officer
Career Service Board

G:/Cases/Gomez,Ruben69-04/Decision
S:/Share/Hearings/Decisions/Gomez Ruben 69-04