

**ORDER GRANTING MOTION TO DISMISS and INITIAL DECISION OF THE ADMINISTRATIVE
LAW JUDGE**

KERBIN SHARP,
Complainant,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

This matter is before the Director/Administrative Law Judge pursuant to Complainant's verbal and written Motion to Dismiss ("Complainant's Motion"), and Respondent's Response to the Motion to Dismiss ("Respondent's Response"). Being advised, it is found:

1. This matter was commenced on March 19, 2001.
2. On June 29, 2001, an evidentiary hearing was held in which the parties provided opening statements and Respondent presented evidence with regard to its case-in-chief.
3. At the close of Respondent's case-in-chief, Complainant verbally moved for dismissal of the matter based on the Colorado Rules of Evidence. At that time, Complainant primarily argued that because Complainant had not been able to complete any approved rehabilitation program, and was never provided the full opportunity to complete a treatment plan, it was arbitrary and capricious for drug tests to be administered and for termination to be imposed.
4. In response, Respondent argued that the discipline imposed was necessary and appropriate given that Complainant had held a safety-sensitive position involving transportation, that there had been a history of substance abuse and progressive discipline related thereto, and that the drug-testing supporting the termination was timely, appropriate and necessary.
5. Both parties cited to state and federal laws involving drug-testing and safety-sensitive/transportation positions. As a result, the ALJ ordered the parties to submit briefs in support of their positions.
6. The parties submitted their briefs and associated legal authority pursuant to order.

The following order is entered:

I. Rule 41 and Motion to Dismiss

Complainant moves that this matter be dismissed pursuant to C.R.C.P. Rule 41(b)(1). This rule provides, in part:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

In other words, Complainant maintains that the facts as established in Respondent's case-in-chief and the applicable law do not support Respondent's imposition of discipline and the imposition of discipline was arbitrary, capricious, and/or contrary to rule or law. Application of Rule 41 is supported, in part, by the precedent set in *Weiss v. Department of Public Safety*, 847 P.2d 197 (Colo. App. 1992) and C.R.S. 24-4-105(7) (2000), which provide that the rules of civil procedure are to be applied to the extent practicable in administrative hearings. Respondent provides little or no legal authority against such an application of Rule 41. Complainant's Motion to Dismiss is deemed appropriate.

Application of Rule 41 in this instance is governed by the standard that in considering a motion to dismiss, the court, being the trier of fact, is not to view the facts in a light most favorable to Respondent or to evaluate whether the Respondent has proven a *prima facie* case. Rather, in ruling on the motion, the Court is to evaluate all the evidence, including, if necessary, weighing the evidence and making inferences from the evidence, including those which would favor Complainant. See: *Teodonna v. Bachman*, 404 P.2d 284 (Colo. 1965); *First National Bank of Denver v. Groussman*, 483 P.2d 398 (Colo. App. 1971) *aff'd*, 491 P.2d 1382 (Colo. 1971). In granting a Rule 41 motion, the trier of fact is required to make findings of fact.

II. Evidence Solicited During Respondent's Case-in-chief

During the course of Respondent's case-in-chief, the following was admitted or stipulated into evidence:

Evidence Label	Evidence Type	Evidentiary Status
1	Disciplinary Termination letter	Stipulated entry
3	Memo to Complainant from Leonard re: R-6-10 meeting	Admitted
4-1	Complainant's 1/5/01 Drug Results	Admitted
5	1/11/01 Memo from Schnackenberg re: appointment for meeting with SAP counselor	Stipulated entry
6	12/29/00 disciplinary action letter	Stipulated entry
8	12/19/00 memo: notice of R-6-10 mtg.	Stipulated entry

9	12/19/00 Drug Results	Admitted
11	CDOT Directive 1245.1	Stipulated entry
14	Executive Order	Stipulated as to Authenticity and Admission
15	State Substance Abuse Policy, Handbook	Admitted
17 -- 27	Substance Abuse Professional letter dated 48/8/97 and CDOT forms 1200 dated 3/14/97 through 1/5/01	Stipulated as authentic and admitted
34	Leave Request 1/2/01	Admitted
36	Leave Request 1/12/01	Admitted
A	12/12/00 Performance Review- Overall Rating of Competent	Admitted

Testimony was received from the following individuals during Respondent's case-in-chief:

- Kerbin Sharp, Complainant (adverse);
- Dennis Roberts, Heavy Equipment Shop Supervisor;
- Patrick Gomez, CDOT Civil Rights Specialist, Region 3;
- Bernie Lay, Maintenance Superintendent, Region 3; and
- Owen Leonard, Appointing Authority.

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses

III. Findings of Fact Deemed Stipulated in Complainant's Motion and Respondent's Response

In the Complainant's Motion and Respondent's Response, Complainant and Respondent cite to facts established during Respondent's case-in-chief. To the extent that the facts are congruent, such facts are deemed stipulations and are as follows:

1. Complainant was employed by the Colorado Department of Transportation ("CDOT") in Craig, Colorado.
2. Complainant was a certified employee who had been employed by CDOT since 1986.
3. Complainant's immediate supervisor at the time of termination was Dennis Roberts. His maintenance superintendent was Bernie Lay.

4. The appointing authority for Complainant's position was Owen Leonard who fills the position of maintenance superintendent. Leonard's office is in Grand Junction, Colorado.
5. Complainant transferred to the position in Craig, Colorado, in September 1999. He transferred from Aurora, Colorado, where he had held a similar position from 1986 to 1999.
6. Complainant is required to possess a commercial driver's license and CDOT considers his position to be safety-sensitive. As a result, federal regulations relating to the Omnibus Transportation Employees Testing Act of 1991 are applicable. (Ex. 10).
7. On April 9, 1997, Complainant received a corrective action for testing positive for amphetamines. Complainant was required to meet with a substance abuse professional ("SAP counselor"). He took the corrective measures and subsequently tested negative on follow-up tests.
8. On December 12, 2000, Complainant was required to submit to a random drug test ("**Test 1**"). His urine sample was determined not to be consistent with human urine by the testing facility.
9. The testing laboratory invalidated the urine test of December 12, 2000, because of the urine specimen problem.
10. Complainant was placed on modified duty which was non-safety related. Arrangements for Complainant to be retested on December 19, 2000 were made ("**Test 2**").
11. The appointing authority held an R-6-10 meeting on December 28, 2000, with regard *only* to **Test 1**. At that time, Complainant admitted to some addiction problems involving either drugs or alcohol. By this time, Test 2 had been administered. (Ex. 6).
12. A disciplinary action was issued on December 29, 2000, linked to Test 1, which consisted of, among other things, a reduction in pay and Complainant was required to see a SAP counselor and complete a substance abuse treatment program. Complainant was to notify Respondent of meeting with a SAP counselor by January 15, 2001.
13. The disciplinary action letter also advised Complainant that future violations of CDOT's directive could result in termination.
14. On January 4, 2001, Leonard received the results of **Test 2** which were positive for amphetamines.
15. On January 5, 2001, Respondent conducted a return-to-duty drug test ("**Test 3**").¹

¹ Respondent stipulates to this fact in Respondent's Response, page 3, paragraph 6.

16. **Test 3** returned a positive amphetamines test result.
17. A notice of a second R-6-10 meeting was provided to Complainant
18. CDOT Directive 1245.1, Exhibit 11, is applicable to this case and both parties are bound by it.

IV. Findings of Fact based on Respondent's Case-in-chief and Evidence Presented

19. Complainant received a notice of an R-6-10 meeting on or about January 18, 2001. (Ex. 3). That notice provided a general reference to concerns about compliance with the CDOT Directive 1245.1, Substance Abuse and Drug and Alcohol testing. No specific test or test results was referenced.
20. After conducting the R-6-10 meeting on January 23, 2001, a disciplinary termination letter was issued which specifically noted the following:
 - The purpose of the meeting was to present information concerning the results of a drug test that had been administered to you on 1/5/01;
 - The result of the 1/5/01 test was positive for amphetamines;
 - Complainant had a progressive discipline history involving the illegal use of amphetamines;
 - Complainant admitted to be continuing to use illegal drugs;
 - That there has not been an opportunity to resolve the issue(s) with the use of a SAP counselor.

(Exs. 1, 4-1).

21. Sharp had been scheduled to meet with a SAP counselor on January 12, 2001, and it was anticipated that a one-on-one interview would be held on January 16, 2001, with a SAP counselor to establish a rehabilitation plan. (Ex.5).
22. During the course of the drug testing and monitoring in December 2000, Complainant was placed on a modified duty schedule which was intended to prevent him from working in safety-sensitive areas, prevent him from driving, and prevent him from providing maintenance services to critical safety elements of transportation machinery. (Complainant, Roberts).
23. Executive Order #D0002 91 exists which prohibits use of drugs in the workplace or in such a way as to cause job impairment. (Ex. 14).
24. Based on his previous failed drug tests in 1997, Complainant was generally familiar with processes involved in providing a random drug test and the consequences of doing so. (Exs. 17-27). He was aware of the need to see a SAP counselor and successfully complete a rehabilitation program.

V. Complainant's Arguments

Complainant primarily argues that based on the above-cited facts, both federal and state regulations are applicable. Complainant first maintains that federal regulations (49 C.F.R. sec. 382.605) provide, in part, that in dealing with issues of "return-to-duty" testing, an individual determined to need assistance in recovery from substance abuse is to be evaluated by a substance abuse professional to determine if the individual has complied with a rehabilitation program as previously recommended by a substance abuse professional. It is Complainant's position that CDOT's own regulations reinforce the federal regulations. Complainant argues that he was terminated for failing Test 3, the return-to-duty test. CDOT Directive 1245.1 provides that before an employee can be returned to work, he must be evaluated by a SAP counselor, undergo a return-to-work drug test, and be evaluated by a SAP counselor to determine if any prescribed rehabilitation program has been followed. It is Complainant's position that because an insufficient opportunity was provided to meet with a SAP counselor and/or participate in a rehabilitation program, the return-to-duty test, i.e., Test 3, was premature and in violation of CDOT's own regulations. The regulations are binding upon the agency as established in *Dept. of Health v. Donohue*, 668 P.2d 945 (1982). Thus, Complainant should not be disciplined, i.e., terminated, based on the results of Test 3.

Complainant notes that evidence was introduced during the hearing that CDOT imposed discipline for reasons beyond the failure of Test 3. However, Complainant maintains that under cross-examination, it was made clear that the discipline/termination was imposed as a result of Complainant's failure to pass Test 3.

VI. Respondent's Arguments

Respondent takes issue with some of the facts as identified in Complainant's Motion. Respondent contends that the evidence shows clearly that Complainant admitted to having an addiction. Respondent further believes that the evidence demonstrates that the disciplinary letter by Respondent with regard to his reduction in pay did not preclude any personnel action which may become necessary as the result of subsequent test results.

Respondent argues that Complainant was given sufficient notice and a specific timeline for completing his meetings with a SAP counselor and showing compliance with a rehabilitation treatment plan. It is Respondent's position that Complainant was to provide evidence, in writing, that he had met with a SAP counselor and was commencing a rehabilitation process. Respondent's evidence, including testimony from Complainant, shows that Complainant claimed he attempted to meet with a SAP counselor as demonstrated by leave records and requests for leave. Yet, evidence also shows that Complainant was only scheduled to meet with a SAP counselor and that no actual treatment plan had been delineated. Respondent further maintains that notice of the second R-6-10 meeting developed out of **Tests 2 and 3** and sufficiently provided notice to Complainant that information was being solicited from Complainant regarding the Procedural Directive 1245.1 re: substance abuse policy.

Respondent maintains that the Omnibus Transportation Employee Testing Act of 1991, 49 C.F.R. sec. 382 mandates that individuals required to drive in their jobs be subject to drug tests. Random drug testing is permitted under the regulatory scheme and Respondent appropriately conducted a random drug test on Complainant. Respondent notes the results of Test 1 are

considered a failure because of the substitution of non-human urine. In addition to random drug testing, the federal regulations require, in part, that with regard to return-to-duty testing:

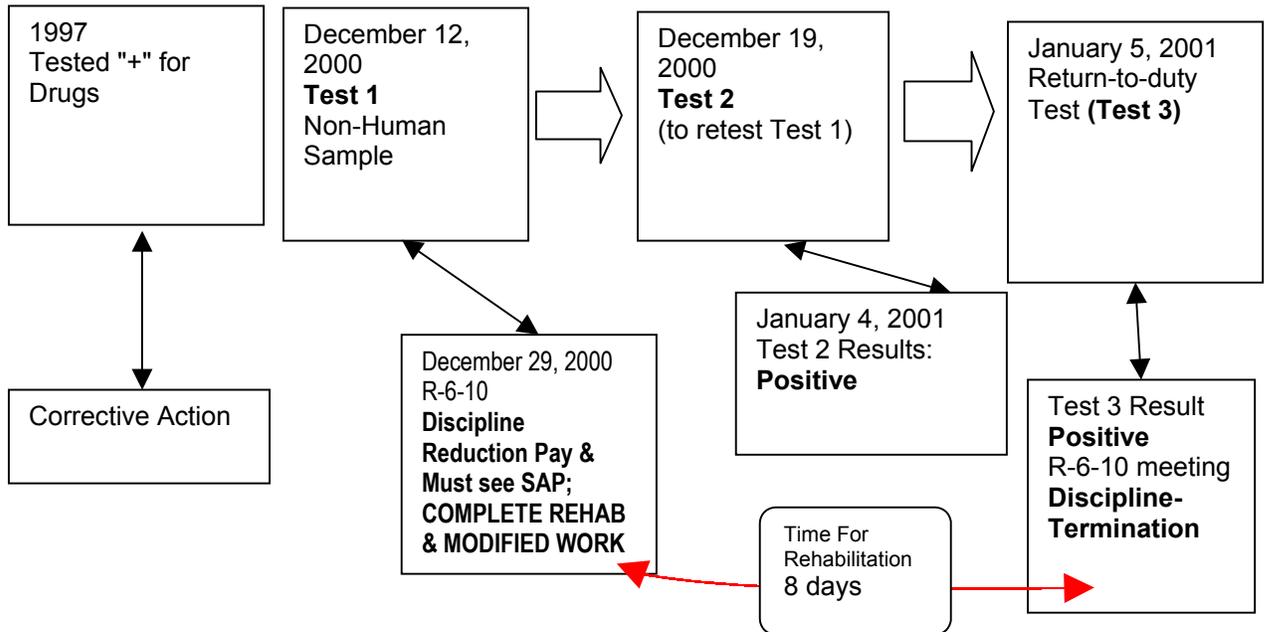
Each employer shall ensure that before a driver returns to duty requiring performance of a safety-sensitive function after engaging in conduct prohibited (above) concerning controlled substances, the driver shall undergo a return-to-duty controlled substances test with a result indicating a verified negative result for controlled substances.

The regulation further outlines that before an employee would be allowed back to work the employee must be evaluated by a SAP counselor; the SAP counselor must determine that the employee has successfully complied with any required rehabilitation; and the employee must take a return-to-duty test with a verified negative result. See: 49 C.F.R. sec. 382.605 (2000). The CDOT directive mimics this requirement. Respondent maintains that Complainant was required to take Test 3 before returning to a normal work schedule which would involve the unsupervised use of safety-sensitive equipment. However, CDOT argues that there is no evidence in the record mandating that the requirements outlined above must occur in a particular order. In other words, it would seem Respondent is arguing that a return-to-duty test can occur at any time subsequent to the initial positive drug test but prior to an opportunity for rehabilitation. Respondent derives this argument from Complainant's past experiences with testing positive for drug use and rehabilitation in 1997 and from 49 C.F.R. sec. 382.309. But, that section only requires that before returning to work in a safety-sensitive function, after a violation (for drug abuse), the employee is to undergo a return-to-duty test.

Further, Respondent maintains that Complainant violated a number of other rules with regard to drug use, warranting an R-6-10 meeting and subsequent discipline in the form of termination. CDOT's policy of zero-tolerance is outlined to employees based on a need to protect the public. After Complainant failed a total of 3 drug tests, Respondent maintains termination of Complainant's employment was the only appropriate level of discipline because of the habitual use of drugs.

VII. Discussion

This case involves the application of federal and state regulations with little or no precedent established to demonstrate application of such regulations. In general terms and in this set of circumstances, an individual in a safety-sensitive position is subject to random drug testing. In the event an employee tests "positive" for an illicit substance, a number of remedies can be deployed. However, both the federal regulations and CDOT's administrative directive contemplate that an employee who has tested positive for illegal substance abuse is to be removed from duty involving safety-sensitive matters, meet with a Substance Abuse Professional for evaluation, and then, if recommended, complete a rehabilitation program. Only then is the employee to receive a return-to-work test. The chronology of events in this case can be demonstrated as follows:



This chronology demonstrates that Complainant was given approximately 8 days to meet with a SAP counselor and complete a rehabilitation program. The evidence supports that this is not possible in dealing with substance abuse. If it was possible, Respondent had the burden in its case-in-chief to demonstrate that the timing between tests would have provided sufficient rehabilitation. Respondent has not met that burden. In addition, evidence was introduced that Complainant was retained to work modified duty with Respondent outside of safety-sensitive positions. An inference can be drawn that Complainant was being given an opportunity to *complete* treatment and fulfill all of his job responsibilities once rehabilitation was successfully completed.

Moreover, both the federal regulations and CDOT's own directive require, if not directly imply, that prior to a return-to-work drug test, an individual who once tested positive for substance abuse, **MUST MEET WITH A SAP COUNSELOR, HAVE AN OPPORTUNITY TO COMPLETE A REHABILITATION PROGRAM, AND THEN BE RETESTED FOR COMPLIANCE.** The facts in this matter, both those stipulated to and those which can be derived from the evidence presented, demonstrate that no actual meeting occurred with a SAP counselor and no time was provided to even begin, let alone successfully complete, a drug rehabilitation program. In addition, the December disciplinary action provided that Complainant had **until February 5, 2001** to complete a rehabilitation program. At one point, Respondent argues, based on federal regulations and precedent, that for an employee to be fully reinstated, three events must occur: (1) the individual must be evaluated by SAP counselor; (2) a SAP counselor must evaluate the success of any completed rehabilitation program; and (3) the employee must take a return-to-duty test with a verified negative result. Respondent argues there is no sequential order to completing these three conditions. Such an argument lacks validity. Clearly, the tasks must be completed in sequential order. A meeting with a SAP counselor, the establishment/design of a rehabilitation program and an evaluation of its success, and a return-to-work test cannot occur in any other order. It would be arbitrary, capricious and contrary to rule and/or law to require a person to take a return-to-work

drug test one day after having tested positive for drug use, have the individual fail the return-to-work test, and then still require him to meet with a SAP counselor and complete a program. Put another way, once CDOT issued the initial disciplinary action allowing for successful rehabilitation by February 5, 2001, and allowing Complainant to work a modified work schedule, it was arbitrary, capricious and contrary to rule and/or law to terminate Complainant prior to February 5, 2001 for a drug test violation during the proposed period of a course of treatment.

Respondent's theory that Tests 2 and 3 stand alone as "independent" drug tests, allowing for additional discipline, is not supported by the facts. Both the documentary and testimonial evidence introduced during hearing, as well as Respondent's stipulations, support the conclusion that the termination was based on results of a return-to-duty test. Further, Tests 2 and 3 cannot be characterized as "follow-up" tests as defined by federal regulations and thus cannot stand as independent drug tests warranting discipline. See: 49 C.F.R. sec. 382.311 (2000).

For the reasons cited above, Complainant's Motion pursuant to C.R.C.P. 41(b) is GRANTED. In no way does this decision sanction Complainant's actions. The evidence shows that Complainant has issues with substance abuse. But, based on the Rule's standard and an analysis of the evidence, and after weighing and drawing proper inferences from the evidence, Respondent failed to abide by its own directives and federal regulations in administering drug tests, making available a real opportunity for rehabilitation to Complainant, and allowing Complainant an opportunity to fulfill the previous requirements of the disciplinary action requiring rehabilitation.

Complainant is to be reinstated to his former position and awarded back pay, as adjusted based on the December 29, 2000 corrective action. In order to be reinstated, Complainant will have to meet with an SAP counselor and successfully complete a rehabilitation program, as initially required under the December 29, 2000 disciplinary action. Respondent is at liberty to set a reasonable deadline for fulfillment of these requirements.

Dated this 14th day
of September, 2001.

G. Charles Robertson
Director/Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of _____, 2001, I placed true copies of the foregoing ORDER OF THE STATE PERSONNEL BOARD and NOTICE OF APPEAL RIGHTS, in the United States mail, postage prepaid, addressed as follows:

Vonda G. Hall, Esq.
C.A.P.E.
1145 Bannock Street
Denver, CO 80203

And in the interagency mail, addressed as follows:

Carol Caesar
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203
