

**UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
OFFICE OF DRUG AND ALCOHOL POLICY AND COMPLIANCE
WASHINGTON, DC**

**In the Matter of: ELIZABETH BETSY POPE d/b/a
EASTGATE LABORATORY TESTING
DOT PIE No. 2015-1**

Served: August 18, 2015

DECISION AND ORDER

Procedural History

The Federal Motor Carrier Safety Administration (FMCSA), an operating administration in the Department of Transportation (DOT), initiated a Public Interest Exclusion (PIE) proceeding, as described in 49 CFR Part 40, Subpart R, against Elizabeth “Betsy” Pope. The PIE was recommended based upon a criminal conviction that resulted from the Medical Review Officer (MRO) services Ms. Pope was providing to a DOT-regulated trucking company through her company, Eastgate Laboratory Testing (Eastgate).¹ From approximately January 2006 through approximately March 2012, Ms. Pope provided drug test results to a DOT-regulated trucking company, without using a qualified MRO, as required by the DOT regulations.

The FMCSA issued a Notice of Proposed Exclusion (NOPE) to Ms. Pope on January 20, 2015, notifying Ms. Pope that she had engaged in serious noncompliance. In the NOPE, the FMCSA stated that the DOT’s Office of the Inspector General conducted a criminal investigation that revealed that Ms. Pope and her company, Eastgate, served as

¹ Ms. Pope did business as Eastgate Laboratory Testing, but that company was not a registered legal entity. Accordingly, Eastgate is not separate from Ms. Pope. It was not separately subjected to criminal charges, was not separately served a NOPE, and has not been separately excluded by this PIE. Because Eastgate was merely the name that Ms. Pope used to engage her fraudulent activity, this PIE affects Eastgate just as it applies to Ms. Pope.

a third-party administrator² to oversee FMCSA drug testing for a trucking company. In that capacity, Ms. Pope wrongfully used the signature of an MRO to certify results, while the MRO had not worked for the company since June 2005. Specifically, the NOPE cited a guilty plea that Ms. Pope entered in the United States District Court for the Western District of Pennsylvania and the resulting December 10, 2014 “conviction for mail fraud relating to [Ms. Pope’s] forgery of a medical review officer’s signature on commercial motor vehicle operator drug tests.”

In the NOPE, the FMCSA recommended that a PIE be issued against Ms. Pope for the maximum duration of five years.

The Office of Drug and Alcohol Policy and Compliance received the NOPE on January 20, 2015. Ms. Pope received the NOPE on January 26, 2015. Under 49 CFR § 40.379, Ms. Pope had 30 days to respond to contest the proposed PIE. The NOPE described the procedures through which Ms. Pope could contest the proposed PIE, including the 30-day timeline. She has not responded to the NOPE as of the date of this decision and has not contested the recommended 5-year exclusion.

Facts

The Criminal Conviction

On April 1, 2014, Ms. Pope was indicted on eight counts relating to her activities in providing drug testing services, by contract as a third-party administrator, to a trucking company in Pennsylvania. In the indictment, the grand jury charged Ms. Pope with mail

² A consortium/third-party administrator is defined as, “[a] service agent that provides or coordinates the provision of a variety of drug and alcohol testing services to employers. C/TPAs typically perform administrative tasks concerning the operation of the employers’ drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together to administer, as a single entity, the DOT drug and alcohol testing programs of its members. C/TPAs are not ‘employers’ for purposes of this part.” 49 CFR § 40.3.

fraud for billing her client for MRO services and signing drug test results as “verified” by using the name of an MRO with whom she had not done business since June 2005. The indictment alleged that she signed the MRO’s name on test results from January 2006 through March 2012.

On July 8, 2014, Ms. Pope was convicted through a plea agreement.³ Ms. Pope pled guilty to one count of mail fraud and acknowledged her responsibility for fraudulent activity from October 2010 through February 2012.

The Decision To Issue A Public Interest Exclusion

Legal Standard

The purpose of a PIE process is “[t]o protect the public interest, including protecting transportation employers and employees from serious noncompliance with DOT drug and alcohol testing rules.” 49 CFR § 40.361(a). A PIE is used to remedy situations where a service agent⁴ “has shown that it is not currently acting in a responsible manner.” 49 CFR § 40.361(b). The Department may issue a PIE if the Department determines that a service agent has “failed or refused to provide drug or alcohol testing services consistent with the requirements of [49 CFR Part 40] or a DOT agency drug and alcohol regulation.” 49 CFR § 40.363(a).

³ On December 10, 2014, the United States District Court for the Western District of Pennsylvania sentenced Ms. Pope to 4 years of probation, with 8 months of home detention. The court also ordered Ms. Pope to pay restitution to the trucking company for the fees she collected from that company.

⁴ A service agent is defined in 49 CFR § 40.3 as “Any person or entity, other than an employee of the employer, who provides services specified under this part to employers and/or employees in connection with DOT drug and alcohol testing requirements. This includes, but is not limited to, collectors, BATs and STTs, laboratories, MROs, substance abuse professionals, and C/TPAs. To act as service agents, persons and organizations must meet the qualifications set forth in applicable sections of this part. Service agents are not employers for purposes of this part.”

Effect of Criminal Conviction Under Part 40

In a PIE proceeding, the initiating official bears the burden of proof. 49 CFR § 40.385. That official must show, “by a preponderance of the evidence, that the service agent was in serious noncompliance” with 49 CFR Part 40.

A criminal conviction of a service agent for an offense related to noncompliance with 49 CFR Part 40 or a DOT drug and alcohol testing rule meets that standard of proof.⁵ The factual issues underlying the conviction are not reopened during the PIE process, and the issuance of the PIE is not contestable.⁶ Thus, the initiating official may propose exclusion without first sending a correction notice.⁷ The only issue open to contest is the duration of the PIE.

Here, Ms. Pope’s criminal conviction satisfies the burden of proof for issuing a PIE. Ms. Pope acted as a third-party administrator to coordinate certain aspects of her DOT-regulated client’s drug and alcohol testing. In that role, she was a service agent subject to 49 CFR Part 40. Her conviction for mail fraud was related to noncompliance with the Part 40 requirements to use a qualified MRO.

⁵ Public Interest Exclusion Q&A: http://www.dot.gov/sites/dot.dev/files/docs/07_12_part40_qa.pdf
When there is a judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction against the service agent, whether entered upon a verdict or plea, including a plea of nolo contendere; or any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution, . . . when the DOT initiating official issues the service agent a Notice of Proposed Exclusion recommending a PIE, the service agent will not be able to contest the facts of the noncompliance or the issuance of the PIE. The service agent would be afforded only an opportunity to contest the proposed length of time the PIE would be in place.

⁶ *Id.* (“[T]he service agent will not be able to contest . . . the issuance of the PIE.”)

⁷ *Cf.* Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 65 Fed. Reg. 79462, 79513 (Dec. 19, 2000) (“There may be some problems that cannot be corrected, or some misconduct so serious that subsequent corrective steps are insufficient to make up for the effects of noncompliance.”). *See also* 49 CFR §§ 40.373-375 (describing a correction notice in the PIE process).

The Scope and Duration of the Public Interest Exclusion

Since the standard of proof for the PIE has been met by the criminal conviction, the duration of the PIE now must be determined. The FMCSA recommended that Ms. Pope be excluded from any activities as a service agent for any DOT-regulated entity for five years: from July 8, 2014, through July 8, 2019. The July 8 date appears to have been chosen because that is the date Ms. Pope entered her guilty plea.

The kinds of mitigating and aggravating factors that the decision-maker may consider are set forth in 49 CFR § 40.389. While the list is not exhaustive or exclusive, it provides an instructional framework for assessing the scope and duration of the PIE.

In the matter currently under consideration, the facts are established through the criminal conviction. No mitigating factors were introduced by either the FMCSA or Ms. Pope, and she has not contested the recommended five-year duration.

Several aggravating factors are present. The noncompliance was deliberate and systemic. As a third-party administrator, Ms. Pope who was doing business as Eastgate was permitted to coordinate certain aspects of her clients' DOT-regulated company's drug and alcohol testing. However, 49 CFR § 40.3 clearly states: "to act as service agents, persons and organizations must meet the qualifications set forth in the applicable sections of this part." Ms. Pope was not a qualified MRO because she was not a physician, as required by 49 CFR § 40.121(c). Yet for at least sixteen months, she repeatedly fraudulently signed the name of a doctor who had been the MRO for Eastgate, but who was no longer associated with Ms. Pope or Eastgate.

Her misconduct was frequent and continued for an extended duration. She engaged in a deliberate and fraudulent pattern of serious noncompliance rising to criminal

activity. Furthermore, the noncompliance affects a key component of the Department's testing program: the role of the MRO. Because of that role, the potential harm that may have resulted from her noncompliance is substantial.

The MRO's Role in Part 40 Procedures

The MRO's review of a DOT-regulated drug test result is a key component in the fairness and integrity of the DOT drug testing program under 49 CFR Part 40. The MRO is responsible for receiving and reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results. The MRO is an independent and impartial "gatekeeper" and advocate for the accuracy and integrity of the drug testing process. When a laboratory reports to the MRO that a specimen is confirmed as "non-negative,"⁸ the laboratory result is not final and is not reported to the employer until the MRO follows the verification process in 49 CFR Part 40, Subpart G. During the verification process, the individual can communicate to the MRO any legitimate medical explanation for the non-negative result.

This verification process also provides the employee with due process in which the employee can confront the evidence and offer a valid medical explanation, if the employee has one. The MRO must determine the medical legitimacy of the employee's explanation. The MRO must determine whether to downgrade the laboratory confirmed non-negative result and report the downgraded result to the employer as a "negative," which allows an employee to continue performing safety-sensitive work; or the MRO must verify the non-negative result and report it to the employer so that the employee can immediately be

⁸ 49 CFR § 40.3 defines a non-negative specimen as "a urine specimen that is reported as adulterated, substituted, positive (for drug(s) or drug metabolite(s)) and/or invalid."

removed from safety-sensitive work. The employee must undergo the return-to-duty process under 49 CFR Part 40, Subpart O.

It is not unusual for an employee to lose his or her job after the employer receives notification from the MRO that the employee had a verified non-negative test result. If the employee holds a certificate or license subject to the jurisdiction of a DOT Agency or the U.S. Coast Guard, the verified non-negative test result may also be grounds for suspending or revoking such privileges. Thus, incorrectly verifying a non-negative result can have severe repercussions for an employee. On the other hand, incorrectly downgrading a result can have disastrous results for transportation safety because this would allow an illegal drug user to continue to operate in a safety-sensitive position.

In summary, when functioning properly under 49 CFR Part 40, the MRO provides quality assurance review of the drug testing process for the specimens; determines if there is a legitimate medical explanation for a laboratory confirmed positive, adulterated, substituted or invalid drug test result; ensures the timely flow of test results and other information to employers; and protects the confidentiality of the drug testing information. The MRO provides the employee with due process by considering relevant medical information that the employee offers to counter the confirmed laboratory result that indicates an allegation that the employee violated the drug testing regulations. Therefore, the MRO's role is key to the accuracy, integrity, and fairness of the Federal testing program.

The MRO's Qualifications

The Department specifically limited the qualifying credentials of who can be an MRO to only a licensed physician who is a Doctor of Medicine or Osteopathy. *See* 49 CFR § 40.121(a). In rejecting requests to recognize other professionals as eligible to

become MROs, the preamble to the final rule for § 40.121(a) explains that “the Department believes that the variety and depth of expertise needed to carry out MRO responsibilities effectively is unlikely to be found in other health professionals. There are clearly differences in the level of training needed to qualify for the various health professions, and we believe that only those professionals with the highest level of training should play this key role.” 65 FR 79462, 79493 (Dec. 19, 2000). The Department further acknowledged that such credentials and relevant training are necessary to ensure that an individual is “able to make capably the difficult judgment calls that MROs are called upon to make.” *Id.*

To ensure that an individual is qualified to fulfill the responsibilities of an MRO, the Department not only requires that the individual be a Doctor of Medicine or Osteopathy, but also that the individual meet the minimum training and continuing education requirements set forth in 49 CFR § 40.121. In establishing the training and continuing education requirements, the Department stated in the preamble to the final rule: “[e]nsuring that MROs are in the best possible position to play this role requires, in our view, that they be well trained both in the substance of drug testing issues and the rules they are called upon to apply.” 65 FR at 79493.

Ms. Pope’s Noncompliance

Ms. Pope was not a qualified MRO, and neither she nor her company, Eastgate, was affiliated with a qualified MRO during the period from October 2010 through February 2012, for which she acknowledged engaging in fraud. Ms. Pope’s actions undermined the integrity and the legitimacy of each of the test results she fraudulently signed, regardless of whether they were negative or non-negative. Ms. Pope’s actions

created risks to transportation safety and interfered with the rights of the individuals subject to testing. The actual and potential harm was great. As such, her actions were extremely egregious.

The PIE

Therefore, it is appropriate to issue a PIE against Elizabeth “Betsy” Pope and Eastgate Laboratory Testing in Tennessee and in all other places that it is doing business. This PIE will prohibit all employers subject to 49 CFR Part 40 from utilizing the drug and alcohol testing services of or doing business with Ms. Pope and Eastgate Laboratory Testing.

The facts of this case justify the recommended PIE duration. In particular, when an unqualified individual acts as an MRO, there is a substantial potential harm that could result from such improper verifications and down-grades of drug test results. The frequency of the violations in this matter, the fact that they persisted for years, and the criminal conviction establish a definite pattern of deliberate noncompliance. However, retroactive exclusion, as recommended by the FMCSA, would not prevent any noncompliance. Consequently, the exclusion begins on the date of this decision and continues for five years

Conclusion

For the foregoing reasons, this decision hereby excludes Elizabeth “Betsy” Pope, and Eastgate Laboratory Testing, in Tennessee and all other places that it is doing business, (hereinafter referred to as “Elizabeth Pope, et al.”) from acting as a service agent or providing any drug or alcohol testing services to any DOT-regulated entity for five years from the date of this decision. Furthermore, this PIE prohibits any DOT-regulated employer from using the drug and alcohol testing services of Elizabeth Pope, et al. for five years from the date of this decision. *See* 49 CFR § 40.409.

The Department will notify employers and the public about this PIE by publishing a “List of Excluded Drug and Alcohol Service Agents” on its website at <http://www.transportation.gov/odapc/pie> and will make the list available upon request. In addition, the Department will also publish a Federal Register notice to inform the public that Elizabeth Pope, et al. are subject to a PIE for five years from the date of this decision. After five years, Elizabeth Pope, et al. will be removed from the list and the public will be notified of that removal. The Department’s notification processes are described in 49 CFR § 40.401.

Elizabeth Pope, et al., must notify each of their DOT-regulated employer clients in writing about the issuance, scope, duration, and effect of the PIE. This notice must occur within three days of receiving this decision, and must “offer to transfer immediately all records pertaining to the employer and its employees to the employer or to any other service agent the employer designates.” The notice requirement may be satisfied “by sending a copy of the Director’s PIE decision or by a separate notice.” Elizabeth Pope, et al. must carry out a record transfer as soon as the employer requests it.

The notification and record transfer requirements on Elizabeth Pope, et al., are described in 49 CFR § 40.403.



PATRICE M. KELLY
ACTING DIRECTOR
OFFICE OF DRUG AND ALCOHOL
POLICY AND COMPLIANCE

Issued this 18st day of August, 2015.

REVIEW AND MODIFICATION RIGHTS

Your rights to seek review of this decision or modification of the exclusion's scope and duration are set forth in 49 CFR Part 40, Subpart R, and are reprinted below for your convenience.

§ 40.405 May the Federal courts review PIE decisions?

The Director's decision is a final administrative action of the Department. Like all final administrative actions of Federal agencies, the Director's decision is subject to judicial review under the Administrative Procedure Act (5 U.S.C. 551 et. seq).

§ 40.407 May a service agent ask to have a PIE reduced or terminated?

- (a) Yes, as a service agent concerning whom the Department has issued a PIE, you may request that the Director terminate a PIE or reduce its duration and/or scope. This process is limited to the issues of duration and scope. It is not an appeal or reconsideration of the decision to issue the PIE.
- (b) Your request must be in writing and supported with documentation.
- (c) You must wait at least nine months from the date on which the Director issued the PIE to make this request.
- (d) The initiating official who was the proponent of the PIE may provide information and arguments concerning your request to the Director.
- (e) If the Director verifies that the sources of your noncompliance have been eliminated and that all drug or alcohol testing-related services you would provide to DOT-regulated employers will be consistent with the requirements of this part, the Director may issue a notice terminating or reducing the PIE.