

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-130

JAMES TRUSTY

APPELLANT

V.

FINAL ORDER DISMISSING APPEAL

TRANSPORTATION CABINET

APPELLEE

*** *** *** *** ***

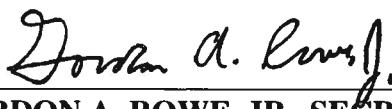
The Board, at its regular May 2024 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated April 10, 2024, Appellant's Exceptions, and Appellee's Response to Exceptions, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer are approved, adopted, and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 17th day of May, 2024.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR., SECRETARY

Copies hereof this day emailed and mailed to:

Hon. Ned Pillersdorf
Hon. Edwin Logan
Hon. Rosemary Holbrook (Personnel Cabinet)
J. R. Dobner

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-130

JAMES TRUSTY

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

TRANSPORTATION CABINET

APPELLEE

** * * * *

This matter came on for an evidentiary hearing on November 17, 2023, at 9:30 a.m., at 1025 Capital Center Drive, Suite #105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A. This evidentiary hearing was conducted both in person and using Amazon Chime video conference.

The Appellant, James Trusty, was present and represented by the Hon. Ned Pillersdorff. The Appellee, Transportation Cabinet, was present and represented by the Hon. Edwin Logan. Also present for the Appellee was Priscilla McCowan.

BACKGROUND

1. The Hearing Officer noted that this appeal was filed with the Personnel Board on September 9, 2022. On the Appeal Form and during the pre-hearing conference, the Appellant, a classified employee with status, indicated he was appealing his dismissal. The Appellant further explained his claims in the narrative portion of the Appeal Form wherein he states, in full:

The Appellant was wrongfully dismissed due to an inaccurate blood alcohol reading. The Appellant had been prescribed Flonase for allergies which caused a random drug test result (0.046). The Appellant submitted documentation from his pharmacist which explained how the prescribed medication caused the inaccurate drug test.

2. The issue for the evidentiary hearing was whether or not there was just cause for the dismissal of the Appellant and whether that penalty was excessive or erroneous. The burden of proof was upon the Appellee, which was by a preponderance of the evidence.

3. **Witness:**

a. Appellee:

- 1) Priscilla McCowan
- 2) Appellant, James Trusty
- 3) Kassandra Smith
- 4) Linda Elkins

b. Appellant:

- 1) James Rudd
- 2) Matthew Allen
- 3) Appellant, James Trusty

4. **Exhibits:**

a. Appellee:

- 1) Dismissal letter for James Trusty dated September 9, 2022
- 2) Transportation Cabinet General Administration and Personnel – 801 Employee Conduct General Conduct
- 3) Drug and Alcohol Testing Handbook for CDL Employees, Kentucky Transportation Cabinet.
- 4) Primary Care Centers of Eastern Kentucky, Certificate of Completion presented to Kassandra Smith, Certified Breath Alcohol Technician, Intoximeter, AlcoSensor IV w/memory dated March 7, 2022.
- 5) Primary Care Centers of Eastern Kentucky letter from Kassandra Smith, dated May 1, 2023, regarding James Trusty's Random Breath Alcohol Test.
- 6) Quality Assurance Program for Intoximeters, including AlcoSensor IV.
- 7) AlcoSensor IV with Memory Operators Manual, printed October 2003
- 8) Department of Transportation (DOT) Alcohol Testing Form for James Trusty, dated August 8, 2022.

b. Appellant:

- 1) To Whom It May Concern letter from Pharmacist Jesse Rudd II, Parkway Pharmacy regarding James Trusty
- 2) To Whom It May Concern letter from Martha Stevens, Physician Assistant, regarding James Trusty.

5. Following the evidentiary hearing, the parties submitted Position Statements as to whether or not Pharmacist Jesse Rudd qualified as an expert witness.

6. This matter has now been assigned to Hearing Officer Mark A Sipek for Findings of Fact, Conclusions of Law, and Recommended Order.

7. On March 14, 2024, a post hearing conference was conducted, Counsel for both parties stated that they had submitted everything necessary for, decision in this case.

FINDINGS OF FACT

1. The Appellant, James Trusty, was employed as a Highway Technician II with the Appellee, Transportation Cabinet. As a part of his duties, he was required to maintain a Commercial Driver's License (CDL). (Testimony of Appellant, McCowen, Allen and **Appellee's Exhibit 1**)

2. Because he was required to maintain a CDL, the Appellant was subject to random drug and alcohol testing. He was selected for a random drug and alcohol test on August 8, 2022. He drove along with his supervisor, Matthew Allen, from Salyersville to the Primary Care Centers of Eastern Kentucky in Hazard for his test. (Testimony of Appellant, McCowen, Allan, and **Appellees Exhibits 1, 2, and 3**)

3. Kassandra Smith, a Certified Breath Alcohol Technician with the Primary Care Centers of Eastern Kentucky, performed the test. She described the procedure she utilized in her written statement (**Appellee's Exhibit 5**) as follows:

To Whom It May Concern,

On August 8, 2022, James Trusty, ID KYT92172686, had a Random Breath Alcohol Test performed. The following steps were performed following the 49 CFR Part 40 Guidelines.

Step one was completed on the DOT ATF (Alcohol Testing Form) The Employee was identified by Driver License Photo.

The Employee then signed Step 2 on the ATF acknowledging that he was about to submit to a Breath Alcohol Test.

A sealed mouthpiece for the AlcoSensor IV was chosen, opened, and inserted into the Breath Alcohol Analyzer under the observation of the Employee. When the mouthpiece was opened from packaging, it was placed into the Breathalyzer, the Employee observed, along with the Breath technician, the date/time and that the test number as they are

displayed on the Breathalyzer. The Blank of .000 was also observed to explain to the employee there is no residual alcohol in the analyzer to cause a false positive before their test is performed.

The employee was then informed to take a deep breath and hold for a couple of seconds, then to blow long and steady until he was told to stop.

After the employee was told to stop, the results were displayed and shown to the employee. The results then printed and were shown to the employee and were taped with tamper evident tape to all 3 copies of the BAT form.

The result was greater than the .020 allowed for a negative result, The employee was informed a confirmation test was to be performed. He was instructed that a repeat breath alcohol test will be performed after 15 minutes to ensure a true positive test. The Breath Analyzer that gave the result did an automatic countdown of a 15 minute waiting period. This analyzer does not allow any breath test to be performed during this 15 minute countdown.

During the 15 minute waiting period, he was instructed to not leave the testing site, to not eat or drink, or put anything in his mouth during this time. If these instructions were to not be followed, it will be documented in the remarks section, and will still be tested at the end of the 15 minute waiting period.

After the 15 minute waiting period, the employee was tested again using a new wrapped mouthpiece and opened and placed in the analyzer under the observation of the employee. The date/time and test number were shown to the employee, the air blank was also noted by the employee of .000 and explained no residual alcohol was in the chamber.

Employee was again informed to take a deep breath, and to blow long and steady until he was told to stop. The employee was shown the result as it was displayed on the breath analyzer. The printout of this result was then attached to the appropriate location on the form.

Step 3 of the ATF was then completed and signed by the collector.

Due to the result being greater than .02, the employee was instructed to not drive or perform safety-sensitive duties or to operate heavy equipment. He was instructed to sign step 4 of Alcohol Form certifying the results documented were observed by him and was instructed of the non-operation of heavy equipment, and non-driving.

Matthew Allen, who was the manager that was with the employee at the time of testing, as well as JB Dobner with KYTC/District 10 as documented in the remarks section of the DOT Breath Alcohol Form, were informed of the positive confirmation result.

As per our QAP (Quality Assurance Plan) for the AlcoSensor IV, the lab supervisor, Linda Elkins performed a calibration check after the positive test and result taped with tamper evident tape to the ATF. No breath alcohol tests were performed on this analyzer before calibration check was performed. Results were within the acceptable range per the QAP.

Attached you will find the BAT Certification for Kassandra Smith as well as the AlcoSensor IV with memory Quality Assurance Plan. (sic)

Thank you,
Kassandra Smith

4. The first test was conducted by Smith at 8:30 a.m. and resulted in a 0.046 blood alcohol level. The second test was administered by Smith at 8:52 a.m. and resulted in the same 0.046 blood alcohol level. (Testimony of McCowen, Smith, and **Appellee's Exhibits 1 and 8**)

5. Primary Care Centers of Eastern Kentucky tested the Appellant using an AlcoSensor IV Intoximeter. The lab supervisor, Linda Elkins, tested the equipment. A test was performed every month. A calibration test was also conducted on August 8, 2022 at 10:19 a.m. after the positive test. The testing demonstrated that the equipment was accurate. Elkins also supervised Smith to insure she followed all United States Department of Transportation guidelines. (Testimony of Smith, Elkins, and **Appellee's Exhibits 6, 7, and 8**)

6. A drug test was also performed on the Appellant that did not show the presence of any drugs. (Testimony of Smith)

7. As a CDL holder, the Appellant was subject to the Drug and Alcohol Testing Handbook for CDL employees. This handbook demonstrates that the Appellee has adopted a

strict “ZERO TOLERANCE” policy with respect to drugs and alcohol. The handbook also informs employees that a “positive test result for alcohol at 0.04 or above” will result in dismissal. Although this was the Appellant’s first positive test, he was dismissed effective September 9, 2022. (Testimony of McCowen and **Appellee’s Exhibits 1 and 3**)

8. The Appellant denied drinking any alcohol the morning of August 8, 2022, or the night before. His supervisor, Allen, let the Appellant drive from Salyersville to Hazard, approximately a one (1)-hour drive. The Appellant did not exhibit any signs of being under the influence to Allen or Smith. (Testimony of Appellant, Allen, and Smith)

9. Shortly after his test results, the Appellant asked his Pharmacist, Brian Rudd, if any of his prescription medication could have caused a false positive. Rudd prepared a report (**Appellant’s Exhibit 1**) that reads as follows:

To Who It May Concern:

My name is Jesse Rudd II. I am a licensed pharmacist at Parkway Pharmacy, Inc in Salyersville, Kentucky. I received my doctorate of pharmacy in 2005. Since then, I have worked in both the hospital and retail settings over the past 17 years. Currently, Mr. James Trusty (DOB – 7/21/1971) is a patient of mine. Recently, Mr. Trusty presented to me that he had registered positive on a breathalyzer test for his place of work. I found this news to be very surprising as I have known him for over 15 years, and never know of or heard of him to drink alcoholic beverages. He asked me if any of his medications could have caused a false-positive. After looking at his medication list, Mr. Trusty is on several different medications for various conditions. One of these medications is Fluticasone Propionate 50mcg Nasal Spray used for the management of nasal symptoms of perennial nonallergic rhinitis. This medication is an aqueous suspension containing several ingredients including phenylethyl alcohol. It is of my professional opinion that this medication could have caused a false-positive on the breathalyzer test. In addition to medications, certain medical conditions could result in a false-positive test result when a person has not consumed any alcohol. One of those conditions is gastrointestinal disorders. A person that suffers with acid reflux or another gastrointestinal condition can build-up acid in the stomach that can create fumes in the stomach and esophagus that could potentially give a false-positive test result. Mr. Trusty suffers from a gastrointestinal condition called GERD, and is on a proton pump inhibitor called Lansoprazole for treatment.

In conclusion, the results of the breathalyzer test could be inaccurate for a number of reasons, such as if the machine was not calibrated properly, the test was not administered correctly, a person is on certain medications or a person has a certain medical condition. Unfortunately, Mr. Trusty is on a medication and suffers from a medical condition that either or both together could have caused a false-positive on his recent breathalyzer test. For these reasons, it is of my professional opinion that this test result be suppressed from Mr. Trusty's record.

Respectfully,
Jesse Rudd II, PharmD

(Testimony of the Appellant, Rudd, and **Appellant's Exhibit 1**)

10. Rudd's testimony was consistent with his report. Rudd testified that the phenylethyl alcohol in Flonase could cause a false positive on a blood alcohol test. Rudd did not know how much alcohol was in Flonase. He did not know how much Flonase it would take to cause a positive reading on a blood alcohol test. Rudd had no specialized knowledge regarding blood alcohol testing. He has not seen any articles warning of false positive blood alcohol tests from Flonase use. There are no warnings on Flonase that its use may cause a positive blood alcohol test. (Testimony of Rudd and **Appellant's Exhibit 1**)

11. Rudd testified that phenylethyl alcohol is different than the alcohol in beer or other alcoholic beverages. He did not testify what effect phenylethyl alcohol might have on an individual. (Testimony of Rudd)

12. The Appellant asked to have Rudd qualified as an expert witness. Rudd offered testimony that Flonase contained phenylethyl alcohol. Other than this fact, Rudd did not offer any science-based expert opinion testimony. He has known the Appellant for over fifteen (15) years and has never heard of his drinking alcoholic beverages. He speculated that Flonase could have caused a false positive but did not offer expert testimony as how the Appellant's positive test result could be false. He also speculated that acid from GERD or interaction with another medication could give a false positive. He also speculated that his breathalyzer test could have been improperly administered or that the machine could have been improperly calibrated. He offered these opinions even though he admitted he did not know anything about breathalyzer tests and did not review the Appellant's test results. For these reasons, the Hearing Officer does not find Rudd's testimony helpful or credible. (Testimony of Rudd and **Appellant's Exhibit 1**)

13. The Appellant introduced a report from Martha Stevens, a Physician's Assistant who did not testify (**Appellant's Exhibit 2**)

14. The Appellee allows CDL drivers to use Flonase. (Testimony of McCowen)

15. Elkins is not aware of any warnings that Flonase could cause a positive blood alcohol test. (Testimony of Elkins)

16. The Drug and Alcohol Testing Handbook for CDL Employees contains the following information regarding alcohol:

Alcohol includes any intoxicating agent in beverage alcohol, methyl, and isopropyl alcohol whether used for medicinal purposes or not. Many over-the-counter and prescription medications may contain high percentages of alcohol. (**Appellee's Exhibit 3**)

17. The Hearing Officer finds the Appellee carried its burden of proof that there was just cause for the dismissal of the Appellant, and the penalty was neither excessive or erroneous.

CONCLUSIONS OF LAW

1. The Appellee carried its burden of proof that the dismissal of the Appellant was for just cause. KRS 18A095(1) and 13B.090(7).

2. The Appellee carried its burden of proof that the dismissal of the Appellant was neither excessive or erroneous. KRS 18A.095(23) and 13B.090(2).

3. The Appellee's Drug and Alcohol Testing Handbook for CDL Employees dictates that an employee who has a positive test for alcohol at .04 or above shall be dismissed. 101 KAR 1:345.

4. KRE 702 reads as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

- 1) The testimony is based upon sufficient facts or data;
- 2) The testimony is the product of reliable principles and

methods; and

- 3) The witness has applied the principles and method reliably to the facts of the case.

5. Jesse Rudd was educated and licensed as a pharmacist. He offered testimony that Flonase contains phenylethyl alcohol. Most of the rest of his testimony was based on conjecture and speculation. Rudd presented no knowledge, skill, experience, training, or education that qualified him to give an expert opinion on the absorption of phenylethyl alcohol in the body or how the use of Flonase would effect a breathalyzer reading. Rudd was not qualified as an expert in this case. KRE 702

6. Appellant's Exhibit 2, the report of Physician Assistant Martha Stephens is hearsay. It was admitted into evidence because "it is the type of evidence that reasonable and prudent persons would rely on in their daily affairs." However, it would not "be admissible over objection in civil actions." For this reason, Appellant's Exhibit 2 is not sufficient to support any findings of fact. KRS 13B090(1) and KRE 802

7. Because all the events underlying this Appeal occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with this Appeal.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **JAMES TRUSTY VS. TRANSPORTATION CABINET (APPEAL NO. 2022-130)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within fifteen (15) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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[Hearing Officer Note: Any document filed with the Personnel Board shall also be served on the opposing party.]

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov

Each Party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of the Hearing Officer this 10th day of April, 2024.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Hon. Edwin Logan
Hon. Ned Pillersdorf
J. R. Dobner
Hon. Rosemary Holbrook (Personnel Cabinet)