U.S. Department of Transportation

Office of the Secretary of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, SE
Washington, DC 20590

NOV 30 2012

Tony B. Jobe
[redacted]

Dear Mr. Jobe:

Thank you for your letters dated August 22, 2012, on behalf of your client, to Robert Ashby, in the U.S. Department of Transportation's (DOT) Office of the General Counsel (OGC); Jim L. Swart, in the U.S. Department of Transportation's Office of Drug and Alcohol Policy and Compliance (ODAPC); and Rebecca MacPherson, in the Federal Aviation Administration's (FAA) Office of the Chief Counsel. Please consider this to be a consolidated response to all three letters.

In your letters, you ask for an interpretation of 49 C.F.R. §40.333 and 14 C.F.R. §120.219. You ask to have all records pertaining to your client's random alcohol test, including the results of the test, removed from his records. These records include those maintained by your client's employer.

We thoroughly reviewed the materials that you submitted, and we had discussions with you regarding your client's matter. Based upon our review of the National Transportation Safety Board decision, other materials provided, and our discussions, we have determined that you have not provided sufficient information for us to decide that the criteria for cancellation have been met under either 49 C.F.R. §40.267 or §40.269.

In your letter, you state that your client's alcohol test is invalid. Because there is no reference in either Part 40 or Part 120 to "invalid" alcohol tests, we believe you are seeking to have your client's breath alcohol test cancelled. In Part 40, there are clear delineations about the errors that are significant enough to cause a test to be cancelled.

Some errors are considered to be "fatal flaws," and these always require cancellation of an alcohol test (§40.267). Other errors, if not corrected, also require cancellation of an alcohol test (§40.269). If an alcohol test is cancelled, the result is neither positive nor negative (§40.273(a)). Alcohol Testing Forms would need to be maintained by your client's employer for one year. We can see nothing in the materials you provided that would compel us to believe your client's test had any flaw referenced in either section. Therefore, your client cannot perform safety-sensitive work for any DOT-regulated employer until your client has completed the Return-to-Duty Process set forth at 49 CFR Part 40, Subpart O, including an evaluation by a qualified Substance

Abuse Professional, compliance with required treatment and/or education, and a negative return-to-duty test result.

We would note however, for the reasoning provided in its August 14, 2012, letter, the FAA has expunged any and all references concerning the Emergency Order of Revocation from your client's airman and medical records maintained by the FAA in its databases. Since your letter of August 22, 2012 raises no new issues regarding Part 120, the FAA refers you to its letter of August 14, 2012.

If you have additional information that addresses how your client's alcohol test result met the cancellation criteria under either 40.267 or 40.269, please contact Patrice M. Kelly, Deputy Director, ODAPC. You can submit information to Ms. Kelly at Patrice.kelly@dot.gov or you can call her at (202) 366-3784.

Please know that this response has been coordinated with ODAPC, the Office of General Counsel, and the FAA's Chief Counsel's Office.

Sincerely,

Neil Eisner
Assistant General Counsel, Regulation and Enforcement Office

Jim Swart
Director, DOT Office of Drug and Alcohol Policy and Compliance

Rebecca B. MacPherson
Assistant Chief Counsel for International Law,
Legislation, and Regulations Division