

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

In the Matter of: MOUNIR R. KHOURI

DOT PIE No. 2015-2

Served: January 20, 2016

DECISION AND ORDER

Procedural History

On August 27, 2015, 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 Mounir R. Khouri. The PIE was recommended based upon a criminal conviction that resulted from the Consortium/ Third Party Administrator (C/TPA)¹ and Medical Review Officer (MRO) services Mr. Khouri was providing to DOT-regulated trucking companies through his company, Mobile Testing Services, Inc. Mr. Khouri pled guilty to conduct in 2009, in which he:

knowingly and willfully made and used a false document knowing the same to contain a materially false and fraudulent statement and entry, that is, a Federal Drug Testing Custody and Control Form (CCF), containing the materially false representation that a Medical Review Officer had

¹ 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.

reviewed a drug test, when in truth and in fact, as Mounir R. Khouri, then well knew, there had been no such drug test and had been no such review.

The FMCSA issued a Notice of Proposed Exclusion (NOPE) to Mr. Khouri on August 27, 2015, notifying Mr. Khouri that he had engaged in serious noncompliance. In the NOPE, the FMCSA stated that the DOT's Office of the Inspector General had conducted a criminal investigation that revealed that Mr. Khouri subverted the Medical Review Officer's (MRO) role in the testing process in that he:

- received laboratory confirmed drug test results and falsely certified that those results were reviewed by a qualified MRO;
- acted as an MRO, without qualifications to do so, by verifying laboratory confirmed positive test results;
- prepared false CCFs for untested specimens and misrepresented that the specimens had tested negative.

The FMCSA's NOPE cited a guilty plea that Mr. Khouri entered in the United States District Court for the District of Vermont and the resulting July 10, 2012 "conviction for making false statements on a Federal Drug Testing Custody and Control Form." The FMCSA recommended that a PIE be issued against Mr. Khouri for the maximum duration of five years.

The Office of Drug and Alcohol Policy and Compliance received the NOPE on September 24, 2015. Mr. Khouri received the NOPE on September 22, 2015. Under 49 CFR § 40.379, Mr. Khouri had 30 days to respond to contest the proposed PIE. The NOPE described the procedures through which Mr. Khouri could contest the proposed

PIE, including the 30-day timeline. Mr. Khouri 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 July 10, 2012, Mr. Khouri was indicted on six counts relating to his activities in providing drug testing services, by contract as a third-party administrator, to FMCSA regulated trucking companies. In the indictment, the grand jury charged Mr. Khouri with mail fraud and false statements. The indictment alleged he had defrauded employers of commercial drivers of money and property by listing the address of Mobile Testing Services as the address of the MRO, receiving the results directly from the laboratories and falsely indicating on the CCFs that the results had been reviewed by an MRO. Mr. Khouri then mailed invoices for the intentionally false MRO reviews.

In addition, the indictment alleged that he did not pay his drug testing laboratory, which then stopped testing specimens. Mr. Khouri then “prepared false CCFs for the untested specimens, misrepresenting that such specimens had tested negative. He then mailed associated invoices to customers.”

On July 10, 2012, Mr. Khouri was convicted through a plea agreement.² He pled guilty to knowingly and willfully making a false statement based on the conduct described above.

² On July 10, 2012, the United States District Court for the District of Vermont sentenced Mr. Khouri to 1 month of incarceration and 2 years of supervised release. The court also ordered Mr. Khouri to pay restitution.

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 agent³ “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).

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.⁴ The factual issues underlying the conviction are not reopened during the PIE

³ A service agent is defined in 49 CFR § 40.3 as “[a]ny 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.”

⁴ 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

process, and the issuance of the PIE is not contestable.⁵ Thus, the initiating official may propose exclusion without first sending a correction notice.⁶ The only issue open to contest is the duration of the PIE.

Here, Mr. Khouri's criminal conviction satisfies the burden of proof for issuing a PIE. Mr. Khouri acted as a third-party administrator to coordinate certain aspects of his DOT-regulated client's drug testing. In that role, he was a service agent subject to 49 CFR Part 40. His conviction for knowingly and willfully making a false statement was related to noncompliance with the Part 40 requirements to use a qualified MRO.

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 Mr. Khouri be excluded from any activities as a service agent for any DOT-regulated entity for five years. In the matter currently under consideration, the facts are established through the criminal conviction.

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. No

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.

⁵ *Id.* (“[T]he service agent will not be able to contest . . . the issuance of the PIE.”)

⁶ *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).

mitigating factors were introduced by either the FMCSA or Mr. Khouri, and he has not contested the recommended five-year duration.

Several aggravating factors are present. The noncompliance was deliberate and systemic. As a third-party administrator, Mr. Khouri was permitted to coordinate certain aspects of his clients' DOT-regulated 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." Mr. Khouri was not a qualified MRO because he was not a physician, as required by 49 CFR § 40.121(c). Yet he repeatedly knowingly and willfully signed on CCFs the name of an MRO who had not reviewed the tests on those CCFs.

In addition, Mr. Khouri reported negative test results to his clients when no laboratory testing had been conducted on those specimens. He posed a direct threat to transportation safety because individuals with positive drug tests were not timely identified and removed or prohibited from performing safety-sensitive work.

Mr. Khouri's willful misconduct posed a direct threat to transportation safety. He engaged in a deliberate and fraudulent pattern of serious noncompliance rising to criminal activity. Furthermore, the noncompliance affects key components of the Department's testing program: the role of the MRO and the removal from service of individuals who pose a threat to transportation safety because of their illegal drug use. *See In re Pope*, DOT PIE No. 2015-1 at 6-9 (Aug. 18, 2015) (discussing the role of the MRO).⁷ Because of these issues, the potential harm that may have resulted from his noncompliance is substantial.

⁷ The Department's PIE decisions are available at <https://www.transportation.gov/odapc/pie>.

Mr. Khouri's Noncompliance

Mr. Khouri was not a qualified MRO, and neither he nor his company, Mobile Testing Services, was affiliated with a qualified MRO. In addition, Mr. Khouri reported negative drug test results for specimens that had not been tested in a laboratory, as required by 49 CFR Part 40. Mr. Khouri's actions undermined the integrity and the legitimacy of each of the test results he fraudulently signed, regardless of whether they were negative or non-negative. Mr. Khouri'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, his actions were extremely egregious.

The PIE

Therefore, it is appropriate to issue a PIE against Mounir R. Khouri. 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 Mr. Khouri.

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. When Mr. Khouri removed DOT-regulated tests from the laboratory testing and the MRO review processes, he established a definite pattern of deliberate noncompliance. Consequently, this PIE will begin on the date of this decision and continue for five years, which is the maximum duration of a PIE.

Conclusion

For the foregoing reasons, this decision hereby excludes Mounir R. Khouri 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 Mounir R. Khouri 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 Mounir R. Khouri is subject to a PIE for five years from the date of this decision. After five years, Mounir R. Khouri 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.

Mounir R. Khouri must notify each of his 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." Mounir R. Khouri must carry out a record transfer as soon as the employer requests it. The notification and record transfer requirements on Mounir R. Khouri are described in 49 CFR § 40.403.



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

Issued this 20th day of January, 2016.

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.