

§ 40.381

§ 40.381 What information do you present to contest the proposed issuance of a PIE?

(a) As a service agent who wants to contest a proposed PIE, you must present at least the following information to the Director:

(1) Specific facts that contradict the statements contained in the NOPE (see § 40.375(b)(2) and (3)). A general denial is insufficient to raise a genuine dispute over facts material to the issuance of a PIE;

(2) Identification of any existing, proposed or prior PIE; and

(3) Identification of your affiliates, if any.

(b) You may provide any information and arguments you wish concerning the proposed issuance, scope and duration of the PIE (see § 40.375(b)(4) and (5)).

(c) You may provide any additional relevant information or arguments concerning any of the issues in the matter.

§ 40.383 What procedures apply if you contest the issuance of a PIE?

(a) DOT conducts PIE proceedings in a fair and informal manner. The Director may use flexible procedures to allow you to present matters in opposition. The Director is not required to follow formal rules of evidence or procedure in creating the record of the proceeding.

(b) The Director will consider any information or argument he or she determines to be relevant to the decision on the matter.

(c) You may submit any documentary evidence you want the Director to consider. In addition, if you have arranged an informal meeting with the Director, you may present witnesses and confront any person the initiating official presents as a witness against you.

(d) In cases where there are material factual issues in dispute, the Director or his or her designee may conduct additional fact-finding.

(e) If you have arranged a meeting with the Director, the Director will make a transcribed record of the meeting available to you on your request. You must pay the cost of transcribing and copying the meeting record.

49 CFR Subtitle A (10-1-07 Edition)

§ 40.385 Who bears the burden of proof in a PIE proceeding?

(a) As the proponent of issuing a PIE, the initiating official bears the burden of proof.

(b) This burden is to demonstrate, by a preponderance of the evidence, that the service agent was in serious non-compliance with the requirements of this part for drug and/or alcohol testing-related services or with the requirements of another DOT agency drug and alcohol testing regulation.

§ 40.387 What matters does the Director decide concerning a proposed PIE?

(a) Following the service agent's response (see § 40.379(b)) or, if no response is received, after 30 days have passed from the date on which the service agent received the NOPE, the Director may take one of the following steps:

(1) In response to a request from the service agent (see § 40.379(b)(1)) or on his or her own motion, the Director may dismiss a PIE proceeding if he or she determines that it does not concern serious noncompliance with this part or DOT agency regulations, consistent with the Department's policy as stated in § 40.365.

(i) If the Director dismisses a proposed PIE under this paragraph (a), the action is closed with respect to the noncompliance alleged in the NOPE.

(ii) The Department may initiate a new PIE proceeding against you on the basis of different or subsequent conduct that is in noncompliance with this part or other DOT drug and alcohol testing rules.

(2) If the Director determines that the initiating official's submission does not have complete information needed for a decision, the Director may remand the matter to the initiating official. The initiating official may resubmit the matter to the Director when the needed information is complete. If the basis for the proposed PIE has changed, the initiating official must send an amended NOPE to the service agent.

(b) The Director makes determinations concerning the following matters in any PIE proceeding that he or she decides on the merits:

- (1) Any material facts that are in dispute;
- (2) Whether the facts support issuing a PIE;
- (3) The scope of any PIE that is issued; and
- (4) The duration of any PIE that is issued.

§ 40.389 What factors may the Director consider?

This section lists examples of the kind of mitigating and aggravating factors that the Director may consider in determining whether to issue a PIE concerning you, as well as the scope and duration of a PIE. This list is not exhaustive or exclusive. The Director may consider other factors if appropriate in the circumstances of a particular case. The list of examples follows:

- (a) The actual or potential harm that results or may result from your non-compliance;
- (b) The frequency of incidents and/or duration of the noncompliance;
- (c) Whether there is a pattern or prior history of noncompliance;
- (d) Whether the noncompliance was pervasive within your organization, including such factors as the following:
 - (1) Whether and to what extent your organization planned, initiated, or carried out the noncompliance;
 - (2) The positions held by individuals involved in the noncompliance, and whether your principals tolerated their noncompliance; and
 - (3) Whether you had effective standards of conduct and control systems (both with respect to your own organization and any contractors or affiliates) at the time the noncompliance occurred;
- (e) Whether you have demonstrated an appropriate compliance disposition, including such factors as the following:
 - (1) Whether you have accepted responsibility for the noncompliance and recognize the seriousness of the conduct that led to the cause for issuance of the PIE;
 - (2) Whether you have cooperated fully with the Department during the investigation. The Director may consider when the cooperation began and whether you disclosed all pertinent information known to you;

- (3) Whether you have fully investigated the circumstances of the non-compliance forming the basis for the PIE and, if so, have made the result of the investigation available to the Director;
- (4) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity that constitutes the grounds for issuance of the PIE; and
- (5) Whether your organization has taken appropriate corrective actions or remedial measures, including implementing actions to prevent recurrence;
- (f) With respect to noncompliance with a DOT agency regulation, the degree to which the noncompliance affects matters common to the DOT drug and alcohol testing program;
- (g) Other factors appropriate to the circumstances of the case.

§ 40.391 What is the scope of a PIE?

- (a) The scope of a PIE is the Department's determination about the divisions, organizational elements, types of services, affiliates, and/or individuals (including direct employees of a service agent and its contractors) to which a PIE applies.
- (b) If, as a service agent, the Department issues a PIE concerning you, the PIE applies to all your divisions, organizational elements, and types of services that are involved with or affected by the noncompliance that forms the factual basis for issuing the PIE.
- (c) In the NOPE (see § 40.375(b)(4)), the initiating official sets forth his or her recommendation for the scope of the PIE. The proposed scope of the PIE is one of the elements of the proceeding that the service agent may contest (see § 40.381(b)) and about which the Director makes a decision (see § 40.387(b)(3)).
- (d) In recommending and deciding the scope of the PIE, the initiating official and Director, respectively, must take into account the provisions of paragraphs (e) through (j) of this section.
- (e) The pervasiveness of the non-compliance within a service agent's organization (see § 40.389(d)) is an important consideration in determining the scope of a PIE. The appropriate scope