IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
February 7, 2023 Session

KARL S. JACKSON v. CITY OF MEMPHIS, ET AL.

Appeal from the Chancery Court for Shelby County
No. CH-20-0696 Jim Kyle, Chancellor

No. W2022-00362-COA-R3-CV

This appeal arises from an employment termination case in which an employee of the Division of Fire Services for the City of Memphis was terminated for a second positive drug test. After receiving notice of his termination, the employee requested an appeal hearing with the City of Memphis Civil Service Commission. Following the hearing, the Civil Service Commission issued a decision affirming the termination of his employment. The employee filed a petition for the trial court to review the decision of the Civil Service Commission. The trial court found that substantial and material evidence did not support the decision and that the decision was arbitrary and capricious. Accordingly, the trial court granted the employee's petition and remanded the matter to the Civil Service Commission. The City of Memphis appeals. We vacate the decision of the trial court and remand to the trial court for entry of an order to remand to the Civil Service Commission with instructions to issue a decision addressing certain deficiencies.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated and Remanded

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and ARNOLD B. GOLDIN, J., joined.

Jennifer A. Sink, City Attorney, and Roane Waring, III, Senior Assistant City Attorney, for the appellants, City of Memphis and City of Memphis Civil Service Commission.

Darrell J. O'Neal and Misty L. O'Neal, Memphis, Tennessee, for the appellee, Karl S. Jackson.

OPINION

I. FACTS & PROCEDURAL HISTORY

This matter involves a decision to terminate the employment of Mr. Karl S. Jackson, who was a lieutenant with the Division of Fire Services ("the DFS") for the City of Memphis ("the City"). Mr. Jackson was hired by the City as a private EMT in 1995. He was later promoted to lieutenant with the DFS and served in that capacity for approximately 12 years prior to his termination. At the time of his termination in 2019, he had been with the DFS for 24 years and 2 months and only needed 10 more months to retire.

In May 2014, Mr. Jackson tested positive for marijuana after submitting to a reasonable suspicion drug screen. Consequently, he was suspended for 360 hours without pay lasting from June 6, 2014, until July 17, 2014. In the meantime, Mr. Jackson was required to participate in an employee assistance program ("EAP"), which he successfully completed. In August 2014, he entered into an Employee Return to Duty Agreement with the City and agreed to, among other things, submit to follow-up alcohol and drug testing for a period of four years, which he complied with. Sometime in early 2019, he sought treatment after the death of his mother. He used his sick leave to voluntarily enter into treatment at Lakeside Behavioral Health System ("Lakeside") and stayed there until the end of March 2019. During his time there, he submitted to regular drug testing, which occurred about twice a week.[1]

On April 18, 2019, after returning to work, Mr. Jackson purportedly tested positive for marijuana again after submitting to a random drug and alcohol screen while on duty at one of the City's fire stations. The report for this drug test was included in the record as Exhibit 11 and was attached to the affidavit of a laboratory operations officer for Quest Diagnostics, Inc. ("Quest Diagnostics"), which was the laboratory that performed the drug test. The report set forth the "initial" and "confirmatory" cutoff concentrations for marijuana metabolites, which were 50 ng/mL and 15 ng/mL respectively. The report indicated a positive result for marijuana metabolites and a urine quantitative result of 15 ng/mL for marijuana metabolite, but it did not specify whether this urine quantitative result was the concentration detected in the initial or confirmatory test. As a result of this second positive drug screen, the DFS informed Mr. Jackson that he was relieved of his employment duties with pay, pending an administrative investigation and hearing. The DFS also informed Mr. Jackson that he was being investigated for possible violations of the DFS's Operations Manual and the City's Personnel Manual. Thereafter, Mr. Jackson requested and paid for a retest of his split specimen on April 26, 2019, which was the second half of his urine specimen collected on April 18, 2019. The retest purportedly

[1] The record includes one of Mr. Jackson's drug tests from Lakeside, which occurred on March 12, 2019. The test indicated a "Preliminary Positive" for "Cannabinoids" but stated that "9-carboxy-THC" was "Not Detected" and that the concentration was therefore below 50 ng/mL. However, the test also stated that it was "a screen only," that a confirmation test could be initiated if needed, and that the positive reported was "unconfirmed and should be used for medical purposes only." Mr. Jackson submitted this drug test to the DFS to show that he was clean and ready to return to work.

reconfirmed that Mr. Jackson tested positive for marijuana.

An administrative hearing and investigation were held at the end of April 2019. At the administrative hearing, Mr. Jackson was given an opportunity to respond to his charges. Afterward, Mr. Jackson received a letter from the DFS dated May 3, 2019, notifying him of the decision to terminate his employment. He then filed a request for an appeal hearing with the Civil Service Commission ("the Commission") and retained counsel.

The matter was assigned to Commissioner Laurice E. Smith, and a hearing was held in November 2019. Mr. Dale Hill, who was an employee with Magtech Drug Testing ("Magtech"), was brought to testify for the purpose of resolving any chain of custody issues regarding Mr. Jackson's urine specimen. Magtech was responsible for collecting Mr. Jackson's urine specimen during his random drug and alcohol screen on April 18, 2019. During Mr. Hill's testimony, Mr. Jackson stipulated to the chain of custody. Mr. Earnest Gray, who was a lieutenant and OSHA coordinator for the DFS, then testified about the drug testing process. He explained that he coordinated the administration of the drug testing for the DFS and that the City followed the U.S. Department of Transportation's ("the DOT") regulations regarding cutoff concentrations for drug testing. He and Commissioner Smith had the following discussion:

> COMMISSIONER SMITH: So did you have any involvement as to the policy or any suggestion for marijuana -- specifically, for marijuana drug testing, like whether it's -- they have a little bit in their system, in their bloodstream? They have a lot? Or is it just if they have any in their system, it is a zero tolerance?
>
> THE WITNESS: Well, I think that is governed by [the] DOT, and they have sudden -- certain cutoff levels for different drugs.
>
> . . .
>
> THE WITNESS: And their cutoff levels are set per drug. I don't know what they are, but they do have certain cutoff levels, and if your level is above that cutoff level, it's -- it's considered positive.
>
> COMMISSIONER SMITH: I see. Do you know what the City's cutoff level is?
>
> THE WITNESS: They mirror [the] DOT.
>
> . . .
>
> COMMISSIONER SMITH: Oh, really? And do you know what that -- what

[the] DOT levels are?

THE WITNESS: No. I -- I don't know right off the top of my head. No, ma'am.

. . .

COMMISSIONER SMITH: So it's my understanding, then, that the City['s] . . . cutoff levels for marijuana [are] guided by the [DOT's] policy?

THE WITNESS: Regulations regarding drug testing, yes.

COMMISSIONER SMITH: So I should be able to find what that is by just going to the [DOT]?

THE WITNESS: Yes, ma'am. And you Google -- Google drug testing.

COMMISSIONER SMITH: Uh-huh (affirmative response).

THE WITNESS: Well, I mean -- not Google. I'm sorry. Search for drug testing --

COMMISSIONER SMITH: Uh-huh (affirmative response).

THE WITNESS: -- and -- and it should direct you to the -- they have certain -- you know, they're going to have certain regulations regarding that.

In his closing statement, counsel for Mr. Jackson took issue with Exhibit 11, arguing that the report only showed Mr. Jackson had 15 ng/mL in his system, which was less than 50 ng/mL. He further argued, "And because there's no one here to explain all of this stuff, the plain documents in which you have in front of you, [the City] can call it positive."

In March 2020, the City filed its proposed findings of fact and conclusions of law. Additionally, almost four months after the hearing, the City filed a post-trial submission and a notice of submission of an affidavit of a records custodian for ClearStar, Inc. ("ClearStar"), which was a medical review office that reviewed and interpreted the results of drug tests. In its post-trial submission, the City reiterated that the cutoff concentrations followed by the City were those established by the DOT's regulations. As an exhibit to the post-trial submission, the City included the DOT's regulation establishing cutoff concentrations for drug tests, i.e., 49 C.F.R. § 40.87.[2] The post-trial submission also

[2] Section 40.87 has been redesignated as section 40.85 effective June 1, 2023. *See* 49 C.F.R. § 40.87.

included an online article from Quest Diagnostics, which explained the relevance of the cutoff concentrations used in drug testing, and an article from the Journal of Medical Toxicology titled, "Interpretation of Workplace Tests for Cannabinoids." The notice of submission of the affidavit of the records custodian for ClearStar noted that both ClearStar and Quest Diagnostics were employed by the City for drug testing services. The affidavit of the records custodian for ClearStar included two medical review officer ("MRO") reports verifying the results of Mr. Jackson's drug test and retest as positive.[3] The MRO reports did not include Mr. Jackson's urine quantitative results for these two tests. Counsel for Mr. Jackson objected to the consideration of these additional materials. He stated, "The hearing is closed and I have no opportunity to cross examine this new evidence." He further stated:

> There was no evidence of the original levels ever submitted and how do I cross examination [sic] this new information post hearing. The City could have submitted anything or called any witness, but now they are attempting to circumvent the entire process with an article and post hearing filing that was never properly submitted.

Counsel for Mr. Jackson then asked Commissioner Smith to set a status conference so he could determine if he needed to file his objection to the post-hearing filings from the City. Commissioner Smith responded, "There is no need for a status conference at this time," and "I will address . . . [the] objections as soon as I have had the opportunity to review the additional documentation submitted by the City of Memphis."

The Commission issued its decision in April 2020, but it is unclear whether the Commission ever addressed the objections because they were not mentioned in its written decision. It is also unclear whether the Commission reviewed or considered the post-hearing filings from the City because it did not reference them in its decision. While the Commission referenced the DOT's regulations, it did not cite to 49 C.F.R. § 40.87, which was the specific DOT regulation provided by the City in its post-trial submission. Instead, the Commission cited to and relied on 49 C.F.R. § 40.95 without any explanation as to why it applied a different section.[4] As part of its findings of facts, the Commission stated the following:

> 26. [Mr. Gray], one of the OSHA Coordinators with the City, testified that he was familiar with Mr. Jackson's case and explained that OSHA is responsible for the overall administration and coordination of the drug testing

[3] Although these two MRO reports were submitted with this affidavit after the hearing, we note that the MRO reports were admitted into evidence during the hearing as part of Exhibit 8.

[4] Section 40.95 governs the adulterant cutoff concentrations for initial and confirmatory tests. *See* 49 C.F.R. § 40.95. The results of Mr. Jackson's drug test indicated that a concentration of creatinine greater than the acceptable range was detected, but the report indicated a negative result for oxidizing adulterants. *See id.* § 40.3 (defining adulterated specimen and oxidizing adulterant).

procedure for the City. . . .

27. Mr. Gray testified that the City does have cutoff levels for prohibited drugs, including Marijuana. The City follows the federal cutoff levels established by the [DOT] and that most, if not all, jurisdictions follow [the] DOT guidelines, including the Tennessee Department of Transportation. Mr. Gray referred Commissioner Smith to the DOT . . . guidelines for drug testing and specific cutoff levels. . . .

28. The DOT . . . guidelines governing adulterant cutoff concentrations for initial and confirmation tests for Marijuana Metabolites (THCA) are as follows:

- the initial test cutoff [concentration] is 50 ng/ml and the confirmatory test cutoff concentration is 15 ng/ml.

This means that on an initial drug test, a result below the cutoff concentration is reported as negative. And if the result is at or above the cutoff concentration, a confirmation test must be conducted. For a confirmation drug test, a result below the cutoff concentration must be reported as negative and a result at or above the cutoff concentration must be confirmed as positive. (49 C.F.R. Section. 40.95)

The Commission then made its conclusions of law, which provided in pertinent part as follows:

4. The City of Memphis, Fire Services Division had just cause to terminate Mr. Jackson's employment as a Fire Lieutenant with the City of Memphis, Fire Services Division based on the findings that he tested positive for Marijuana on April 18, 2019, which followed his first positive test for Marijuana determined by May 29, 2014.

5. Mr. Jackson's termination was based upon his violation of the Division of Fire Services Operation Manual Volume 100 – Rules and Regulations, Section 102.01, Page 4, Paragraphs 25 & 26 and Section 103.01, Pages 2 & 3, Paragraphs 11(j), 11(p) & 11(s) Major Violations as set above.

6. Mr. Jackson's termination was also based upon his violation of the City of Memphis Personnel Manual - Policies and Procedures, Section 38-00/38-02, Page 1, Paragraph 9 (Grounds for Disciplinary Action) and Section 78-00/78.03, Pages 6 & 12, Paragraph V, Consequences.

7. The City of Memphis has proven by a preponderance of the evidence that the City of Memphis, Fire Services Division had a reasonable

> basis to terminate the employment of Mr. Jackson due to his violations of the governing Division of Fire Services Rules and Regulations and the City of Memphis Policies and Procedures referenced herein.
>
> 8. The second violation of reporting to work under the influence of Marijuana placed Mr. Jackson in violation of the City's Return to Work Agreement, which resulted in his termination.
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> 9. 49 C.F.R. Section 40.95 of the [DOT] Rules governing cutoff levels (both initial and confirming) for drug testing are used by the City of Memphis under its Drug Free Workplace Policy.

Accordingly, the Commission affirmed the DFS's decision terminating Mr. Jackson's employment.

In June 2020, Mr. Jackson filed a petition in the trial court seeking review of the Commission's decision affirming the termination of his employment. He averred that the decision to terminate his employment should be overturned for several reasons. Though not exactly stated as such, he argued that the decision was not supported by substantial and material evidence because the City failed to establish the following: (1) whether the City abided by and complied with the DOT's regulations when drug testing Mr. Jackson; (2) whether Mr. Jackson's drug test results on both the initial and confirmatory test met the DOT's cutoff concentrations for marijuana; and (3) whether Mr. Jackson's retest of his split specimen tested positive for marijuana according to the DOT's regulations. Additionally, he argued that the decision was arbitrary and capricious because Commissioner Smith relied on evidence not submitted during the hearing and therefore relied on evidence outside of the record. Therefore, Mr. Jackson asked the trial court to reverse the Commission's decision affirming his termination and to reinstate him with full backpay, benefits, and other entitlements. The City subsequently filed a response to the petition requesting that the matter be dismissed.

After reviewing the administrative record and holding a hearing on the matter, the trial court entered its order in February 2022. The trial court found as follows:

> Mr. Jackson was terminated based solely on his positive result. Mr. Jackson argues that no substantial and material evidence supports the Commission's decision and his test result of 15 ng/mL does not violate the City's policy. No party contests the fact that Mr. Jackson supplied the urine specimen. Nor does either party contest the chain of custody offered by the City. The parties do contest whether Mr. Jackson's test result violates the City's policies.
>
> The City did not offer any evidence related to the analysis and interpretation of Mr. Jackson's results as related to the City's policies. The City relies on

> Exhibit 11, the Affidavit of Dawn Hahn, a records custodian with Quest Diagnostics, to establish that Mr. Jackson's sample records are legitimate. The City merely argues that the results speak for themselves. Exhibit 11 includes a document that purportedly shows that Mr. Jackson's sample indicated a marijuana metabolite level of 15 ng/mL, but that document alone does not establish the relevance of a 15 ng/mL result.
>
> Nor would the affidavit alone lead a reasonable person to conclude that the 15 ng/mL test result violates the City's policy. In support of its claim, the City offered one of its OSHA Coordinators, Mr. Ernest Gray, who testified that there **is** a number used by the City as a cutoff level for a test result. Based on the transcripts of the hearing, . . . Commissioner [Smith] apparently used an internet search engine to establish the finding in her decision that the initial test cutoff is 50 ng/mL and the secondary confirmatory test cutoff concentration is 15 ng/mL. . . . But, no evidence in the Record shows that Mr. Jackson ever had an initial test result of 50 ng/mL. The test results contained in Exhibit 11 show a 15 ng/mL level of marijuana metabolites, not a 50 ng/mL result. There is a huge gap in reasoning here.
>
> Furthermore, the City assumes that the test was analyzed correctly, but does not offer sufficient evidence to support this assumption. It is unknown to the Court why the City did not offer such evidence, but the City's decision should not bind [Mr. Jackson] from receiving his retirement benefits and remaining pay. There is insufficient evidence in the Record to support the Commission's decision.

For these reasons, the trial court concluded that substantial and material evidence did not support the Commission's decision. The trial court further concluded that the Commission's decision to uphold the termination of Mr. Jackson was arbitrary and capricious because the only evidence to support his termination was the test result showing marijuana metabolite in the amount of 15 ng/mL, which was below the amount of 50 ng/mL required to violate the City's policy. The trial court did not address the merits of the issue regarding the retest because it found the issue was moot. Accordingly, the trial court granted Mr. Jackson's petition and remanded the matter to the Commission. Thereafter, the City timely filed an appeal.[5]

[5] In August 2022, this Court entered an order finding that there did not appear to be a final judgment. We specifically stated that the trial court did not adjudicate Mr. Jackson's request for reinstatement with full backpay, benefits, and other entitlements that the court deemed proper. As such, we ordered the City to supplement the record with a final judgment entered by the trial court. In September 2022, the trial court entered an amended order granting Mr. Jackson's request for reinstatement with backpay, benefits, and other entitlements, and granting his request that he be reinstated pending any appeals. Additionally, the trial court granted Mr. Jackson's requests for attorney's fees, costs, and expenses. The record was then supplemented with the trial court's amended order. After the parties filed their appellate briefs, the City

II. ISSUES PRESENTED

The City presents just one issue for review on appeal, which we have slightly restated:

1. Whether the trial court failed to apply the appropriate standard of review pursuant to Tennessee Code Annotated section 4-5-322 in finding the Commission's decision upholding the termination of Mr. Jackson's employment was arbitrary and capricious.

For the following reasons, we vacate the decision of the trial court and remand to the trial court for entry of an order to remand to the Commission with instructions to issue a decision addressing certain deficiencies.

III. STANDARD OF REVIEW

The scope of the review in this case is the same for the trial court and this Court. *Davis v. Shelby Cnty. Sheriff's Dep't*, 278 S.W.3d 256, 264 (Tenn. 2009) (citing *Gluck v. Civil Serv. Comm'n*, 15 S.W.3d 486, 490 (Tenn. Ct. App. 1999)). When reviewing a civil service board's decision upholding the termination of a civil service employee, courts apply the standards for judicial review set forth in the Tennessee Uniform Administrative Procedures Act ("the UAPA"). *Moss v. Shelby Cnty. Civ. Serv. Merit Bd.*, 597 S.W.3d 823, 830 (Tenn. 2020). Specifically, Tennessee Code Annotated section 4-5-322(h) of the UAPA "contains the standard of judicial review that is used to review decisions of the City of Memphis Civil Service Commission." *Davis v. City of Memphis*, No. W2016-00967-COA-R3-CV, 2017 WL 634780, at *3 (Tenn. Ct. App. Feb. 16, 2017) (citing *City of Memphis v. Lesley*, No. W2012-01962-COA-R3-CV, 2013 WL 5532732, at *6 (Tenn. Ct. App. Oct. 7, 2013)). It provides that:

> (h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;

filed a motion for extension to file their reply brief, which was granted by this Court. However, the City did not file a reply brief.

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.

(B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h).[6] "The reviewing court may reverse, remand, or modify a civil service board decision only for errors that affect the merits of the decision." *Moss*, 597 S.W.3d at 830 (citing Tenn. Code Ann. § 4-5-322(i)).

IV. DISCUSSION

The sole issue on appeal is whether the trial court failed to apply the appropriate standard of review pursuant to Tennessee Code Annotated section 4-5-322 in finding the Commission's decision upholding the termination of Mr. Jackson's employment was arbitrary and capricious and unsupported by substantial and material evidence. However, we do not reach this issue.

Instead, we begin by observing that "a reviewing court must have sufficient information regarding the agency action to determine whether the action comports with the law and to avoid substituting its judgment for that of the administrative tribunal." *Thacker v. City of Greenville*, No. E2020-01106-COA-R3-CV, 2021 WL 3124309, at *5 (Tenn. Ct. App. July 23, 2021) (quoting *Macon v. Shelby Cnty. Gov't Civ. Serv. Merit Bd.*, 209 S.W.3d 504, 511 (Tenn. Ct. App. 2009)) (footnote omitted). Similar to our decision in *Thacker*, we have determined that "[w]e are unable to proceed in our review because we are missing necessary information." *Id.*

The City's drug-free workplace policy provided that the City's drug and alcohol test

[6] We cite to the prior of the version statute here, which was in effect from April 11, 2019, to May 17, 2021. The parties also rely on this version of the statute in their appellate briefs. We note, however, that this statute has been amended, which became effective May 18, 2021. Tenn. Pub. Acts, Ch. 461, § 4. It is "appli[cable] to disciplinary actions taken or information first received on or after the effective date of" May 18, 2021. Tenn. Pub. Acts, Ch. 461, § 6. Therefore, the prior version of the statute applies to the present case because Mr. Jackson received his letter of termination on May 3, 2019. *See Copeland v. Tenn. Dep't of Corr.*, No. M2021-01557-COA-R3-CV, 2022 WL 17368978, at *4 n.5 (Tenn. Ct. App. Dec. 2, 2022).

collections must be performed in accordance with the DOT's regulations found in 49 C.F.R. Parts 40 and 382. At the hearing before the Commission, Mr. Gray explained that the City followed the DOT's regulations regarding cutoff concentrations for drug testing. Yet, the City did not provide the specific DOT regulation establishing cutoff concentrations, i.e., 49 C.F.R. § 40.87, until after the hearing.

As previously noted, the City submitted post-hearing filings in March 2020. Particularly, the City submitted 49 C.F.R. § 40.87 as an exhibit. While the Commission's decision stated that it considered "the documentary evidence," it failed to mention whether it reviewed or considered any of the post-hearing filings from the City. Furthermore, counsel for Mr. Jackson objected to the post-hearing filings, and the Commission stated that it would address his objections. However, there is nothing in the record indicating that the objections were ever addressed. Consequently, while the post-hearing filings from the City are included in the appellate record, it is not clear to this Court whether the post-hearing filings are part of the administrative record that the Commission considered in making its decision. Thus, it is also unclear whether we, as the reviewing court, may consider the post-hearing filings. *See Marshall v. Civ. Serv. Comm'n of State*, No. M2011-02157-COA-R3-CV, 2012 WL 5494615, at *5 (Tenn. Ct. App. Nov. 9, 2012) (explaining that this Court's review of an agency's decision is "narrow, statutorily prescribed, and *confined to the administrative record*") (emphasis added); Tenn. Code Ann. § 4-5-322(g) ("The review . . . shall be confined to the record.").

We also point out that the Commission's decision ultimately did not rely on 49 C.F.R. § 40.87, which was provided by the City in its post-trial submission; rather, the Commission's decision cited to and relied on 49 C.F.R. § 40.95. As previously noted, section 40.95 governs the adulterant cutoff concentrations for initial and confirmatory tests. *See* 49 C.F.R. § 40.95. Yet, the results of Mr. Jackson's drug test did not indicate that his urine specimen was adulterated. *See id.* § 40.3 (defining adulterated specimen and oxidizing adulterant). The Commission failed to provide an explanation of why it relied on section 40.95 instead of section 40.87.[7]

Because of these issues surrounding the applicable regulation, this Court is "left to speculate" as to whether the Commission's decision comports with the City's policies. *Thacker*, 2021 WL 3124309, at *8 (quoting *Swift Roofing, Inc. v. State*, No. M2010-02544-COA-R3-CV, 2011 WL 2732263, at *7 (Tenn. Ct. App. July 13, 2011)). Under similar circumstances, we have found the best remedy is to vacate the decision and remand this matter to the Commission. *Id.*; *see Smith v. Amerisure Ins. Co.*, No. 03A01-9406-CV-00223, 1994 WL 679066, at *1 (Tenn. Ct. App. Dec. 5, 1994) ("We have made a thorough review of the record and are of the opinion complete justice cannot be had by reason of defects in the record.").

[7] We note that this specific DOT regulation, section 40.95, was never specifically mentioned at the hearing before the Commission nor was it provided as an exhibit at the hearing or post-hearing.

Accordingly, we vacate the decision of the trial court and remand to the trial court for entry of an order to remand to the Commission with instructions to issue a decision addressing these deficiencies. Specifically, the Commission must address the objections raised by counsel for Mr. Jackson regarding the post-hearing filings from the City so that it is clear whether it considered the post-hearing filings in making its decision, and in the event that the Commission still intends to rely on 49 C.F.R. § 40.95, it should explain its reasoning for doing so.

V. CONCLUSION

For the aforementioned reasons, we vacate the decision of the trial court and remand to the trial court for entry of an order to remand to the Civil Service Commission with instructions to issue a decision addressing the deficiencies outlined above. Costs of this appeal are taxed equally between the parties, for which execution may issue if necessary.

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CARMA DENNIS MCGEE, JUDGE