



U.S. Department  
of Transportation  
**Pipeline and Hazardous  
Materials Safety  
Administration**

1200 New Jersey Avenue, SE  
Washington, DC 20590

July 06, 2022

Christopher J. Chantry  
General Counsel  
International Union of Operating Engineers, Local No. 49  
2829 Anthony Lane South  
Minneapolis, MN 55418

Dear Mr. Chantry:

In your May 4, 2022, letter to the Pipeline and Hazardous Materials Safety Administration (PHMSA) you requested an interpretation of the federal pipeline safety regulations in 49 CFR Part 199 with respect to whether employees in the *Gas Distribution Designer* job classification at Minnesota Energy Resources Corporation (MERC) are in a safety-sensitive position that is subject to PHMSA/DOT random drug testing.

PHMSA promulgated the first drug testing regulations in 1988 wherein PHMSA required pipeline operators to have an “anti-drug program for employees who perform certain sensitive safety-related functions covered by the pipeline safety regulations.”<sup>1</sup> While the original drug testing rule did not define covered employee or covered function, it was explained in the preamble that the drug testing regulations were limited to “those who perform regulated operation, maintenance, or emergency-response functions...on existing pipelines.”<sup>2</sup>

In other words, from the onset of the drug testing regulations in 1988, PHMSA has specified that the functions performed by employees subject to the regulations are operations, maintenance, and emergency-response functions subject to Parts 192, 193, and 195 that are performed on a pipeline. Moreover, from the onset PHMSA specifically excluded the design function from DOT drug testing.<sup>3</sup>

We reviewed the Job Profile you submitted (Exhibit # 4) and did not identify any functions subjecting a MERC *Gas Distribution Designer* to any PHMSA/DOT drug and alcohol (D&A) testing. While the position does perform some maintenance functions that may be regulated by Part 192, the functions described are not performed on the pipeline, which is the discriminator

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<sup>1</sup> 53 FR 47084

<sup>2</sup> 53 FR 47089

<sup>3</sup> 53 FR 47088

between maintenance functions that are D&A covered and maintenance functions that are not D&A covered.

In summation, our review of the *Gas Distribution Designer* Job Profile you provided did not identify the specific responsibilities necessary for this position to be subject to drug or alcohol testing under the PHMSA regulations in Part 199.

Notwithstanding the above, nothing in Part 199 prohibits an employer from D&A testing any of its employees using non-DOT procedures, including those employees already subject to D&A testing under PHMSA regulations.

If we can be of further assistance, please contact Tewabe Asebe at 202-366-5523.

Sincerely,

John A. Gale  
Director, Office of Standards  
and Rulemaking

# INTERNATIONAL UNION OF OPERATING ENGINEERS

LOCAL NO. 49, 49A, 49B, 49C, 49D, 49E, 49L  
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May 4, 2022

John Gale  
Office of Pipeline Safety (PHP-30)  
Pipeline and Hazardous Materials Safety Administration  
1200 New Jersey Avenue, SE  
Washington, DC 20590-0001

*RE: Request for Interpretation of 49 CFR Part 199 and 49 CFR Part 40*

## I. Introduction

Dear Mr. Gale:

Pursuant to 49 Code of Federal Regulations (“CFR”) § 190.11(b), the International Union of Operating Engineers, Local No. 49 (“Local 49” or the “Union”) is requesting a written regulatory interpretation from the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) Office of Pipeline Safety regarding:

- 1) whether the job classification of “Gas Distribution Designer” is a safety sensitive position covered under PHMSA guidelines under the U.S. Department of Transportation?**
- 2) whether the Gas Distribution Designer classification is subject to random drug tests as outlined by 49 CFR Part 199 and 49 CFR Part 40?**

## II. Background Information

Local 49, a trade union, represents employees in the Gas Distribution Designer classification of Minnesota Energy Resource Corporation (“MERC” or the “Company”) a Company that, according to its website, “delivers natural gas to 243,000 customers in 179 communities across Minnesota.” Gas Distribution Designer employees work under a collective bargaining agreement (“CBA”) negotiated between the Union and the Company. *See Exhibit 1*. One of these Gas Distribution Designer employees was informed that they needed to participate in a randomly selected drug test. The result was a “confirmed positive test” and the employee was subsequently terminated from their employment for “violation of the Company’s Alcohol and Other Drug Use Policy”. *See Exhibit 2 and Exhibit 3*.

The Gas Distribution Designer classification description (*See Exhibit 4*) states that the position “[p]rovide design/estimate for main infrastructure and larger gas service projects. Contribute to work methods needed to complete the project and provide work direction to Contractor for

construction methods according to Company standards.” The description also provides the responsibilities and essential functions of the classification description – please review *Exhibit 4* for the entire list of responsibilities and essential functions.

Additionally, according to the terminated employee, their duties in the Gas Distribution Designer classification included: Receiving pipe installation or replacement data from Techs/Construction Coordinators/Engineers and inputting that data into software to make maps, cost estimates and work requests for contractors; pulling permits from cities/counties/state; initial environmental evaluation for environmental contractors; approving invoices; closing projects and making project folders; and, taking contractor calls and questions. Additionally, all work was performed from an office – no work was performed directly on the pipeline and the employee (and the Gas Distribution Designer classification as a whole) is not operator qualified – per 49 CFR Part 192, Subpart N – to touch the pipeline.

In subsequent information requests from the Union, the Company confirmed that the employee was terminated for a violation of the Company’s Alcohol and Other Drug Use Policy which the Company claimed applied to the employee pursuant to 49 CFR Part 199 and 49 CFR Part 40. The Company’s justification for 49 CFR Part 199 and 49 CFR Part 40 applying to the employee was based on the Company’s claim that the Gas Distribution Designer classification is a safety sensitive position performing covered functions and subject to drug/alcohol testing 49 CFR Part 199 and 49 CFR Part 40. Specifically, the Company claimed that the Gas Distribution Designer classification performed the following covered functions: “Designing: a regulating station when the regulation station is being replaced or redesigned to meet the maintenance requirements of 49 CFR 192.739” and, “Designing: maps to be used in connection with compliance with a Part 192 regulation.” See *Exhibit 5, Page 78*. The employee claims that in their role as a Gas Distribution Designer they did not have anything to do with designing regulation stations. The employee further claims that designing maps to be used in connection with compliance with a Part 192 regulation *is not* a covered function and that the Company has incorrectly included this job duty as a covered function. This is based on 49 CFR Part 192.3 which defines “pipeline” as “all parts of those physical facilities through which gas moves in transportation, including pipe, valves, and other appurtenance attached to pipe, compressor units, metering stations, regulator stations, delivery stations, holders, and fabricated assemblies.”

### **III. Application of 49 CFR Part 199 and 49 CFR Part 40**

Local 49’s understanding of the relevant federal regulations is that an employee is subject to drug testing under Part 199 and Part 40 when that person performs on a pipeline or LNG facility an operation, maintenance, or emergency response function regulated by 49 CFR Parts 192, 193 or 195.

Based on the information and data provided directly from the Company and from the terminated employee, it is Local 49’s belief that the Gas Distribution Designer classification is not a safety sensitive position and not subject to random drug tests as outlined by 49 CFR Part 199 and 49 CFR Part 40.

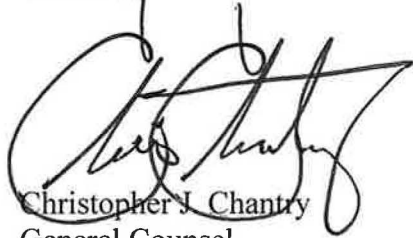
### **IV. Conclusion**

In closing, the Union asks again, based on the information and exhibits provided, **is the Gas Distribution Designer classification a safety sensitive position that is subject to random drug testing as outlined by 49 CFR Part 199 and 49 CFR Part 40 or any other applicable federal regulation?**

Due to the termination of the employee and serious nature of the situation, Local 49 respectfully requests that an interpretation be provided as soon as reasonably practicable.

Thank you for your consideration of this request. If you have any questions, please contact me at 612-900-5651 or [cjchantry@local49.org](mailto:cjchantry@local49.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Chantry", written over a circular stamp or seal.

Christopher J. Chantry

General Counsel

International Union of Operating Engineers, Local No. 49

2829 Anthony Lane South

Minneapolis, MN 55418

Enclosure: IUOE Local 49 Interpretation Request Exhibits 1-6