12-14-2011

Dept. of Water and Sewerage Services, Petitioner, Vs. Doug R. Johnson, Grievant.

Follow this and additional works at: http://trace.tennessee.edu/utk_lawopinions

Part of the Administrative Law Commons

This Initial Order by the Administrative Judges of the Administrative Procedures Division, Tennessee Department of State, is a public document made available by the College of Law Library, and the Tennessee Department of State, Administrative Procedures Division. For more information about this public document, please contact administrative.procedures@tn.gov
BEFORE THE CIVIL SERVICE COMMISSION FOR THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

IN THE MATTER OF:

Dept. of Water and Sewerage Services, Petitioner, DOCKET NO: 43.02-112812J

Vs.

Doug R. Johnson, Grievant.

INITIAL ORDER

This matter was heard on December 14, 2011, before Steve R. Darnell, Administrative Law Judge, assigned by the Administrative Procedures Division, Office of the Secretary of State, and sitting for the Civil Service Commission of the Metropolitan Government of Nashville and Davidson County. Petitioner, Nashville Department of Water and Sewerage, was represented by Ms. Corey Harkey with the Nashville Department of Law. Grievant, Doug Johnson, was represented by attorney James G. King. The record in this case closed on April 4, 2012 when Petitioner filed its response to Grievant’s post-hearing pleadings.

ISSUE FOR CONSIDERATION

Did Petitioner properly demote and reassign Grievant for violation of its policies concerning the McCabe Park Community Center (McCabe Project)?

SUMMARY OF DETERMINATION

After consideration of the evidence, arguments of counsel, and the record as a whole, it is determined Grievant was properly demoted and reassigned, and Petitioner’s decision is UPHELD. This determination is based upon the following Findings of Fact and Conclusions of Law:
FINDINGS OF FACT

1. From June 2010 to March 2012, Grievant was employed by Petitioner as an Engineer Technician 3. Grievant was required to oversee and inspect various water line installation projects.

2. Grievant has worked for Petitioner for approximately 26 years.

3. Disinfection is required on all new water line construction projects, to ensure the public welfare and safety of the drinking water through the Tennessee Department of Environment and Conservation (TDEC).

4. Petitioner is required to keep documentation of completion of the disinfection procedures, in accordance with TDEC regulations. New water lines are disinfected with a chlorine solution that is left in the new line for at least 24 hours. Petitioner is audited yearly to ensure compliance.

5. Petitioner’s Inspector’s Manual and accompanying American Waterworks Association (AWWA) standards establish that new water line projects must be tested for disinfection with two bacteriological samples taken within 24 hours of each other.

6. Petitioner’s Inspector’s Manual and accompanying AWWA standards also require a “jumper” be placed on the construction taps, with a backflow preventer and valve, to allow the new water line to be filled for testing prior to connection to the main water line.

7. A “jumper” system is necessary so untreated water from the new line cannot flow back into the existing main line and contaminate drinking water.
8. Grievant is provided annual training on Petitioner’s policies and procedures including the requirements of testing and disinfection to be followed with new water line projects.

9. Grievant was trained on and aware of the requirement to conduct two bacteriological samplings over a 24 hour period for all new water line projects, with the use of a “jumper.”

10. In June of 2010, Grievant was assigned to inspect Project #08-WL-79 or the McCabe Project.

11. Grievant’s responsibilities included overseeing the project to ensure the contractor followed Petitioner’s rules and regulations for the new water line, including construction, disinfection of the water line, and installation of a working fire hydrant.

12. Grievant was responsible for documenting the project’s completion and disinfection process. Grievant was to log this information into Petitioner’s Engineering Tracking System (ETS) as work on the project was completed.

13. Additionally, Grievant was responsible for ensuring the bacteriological sampling was taken, coordinating the collection of the samples with Petitioner’s lab, and completing the paperwork showing the sampling had been performed.

14. The McCabe Project contractor supplied the tapping sleeve and valve to connect the new line to Petitioner’s main. Petitioner’s workers actually tap or connect the new water line to Petitioner’s main line.
15. While preparing for its TDEC audit in February 2011, Petitioner was unable to locate any paperwork showing the McCabe Project received the two required bacteriological samplings as part of its disinfection protocols.

16. Grievant was made aware of the deficiencies in his documentation. In response, on February 2, 2011, Grievant entered in ETS that the McCabe Project had been tapped or connected to the main line on June 15, 2010. This means water could flow through the new water line on and after June 15, 2010.

17. In fact, the new McCabe Project line was not connected until September 15, 2010 by Petitioner’s workmen.

18. To confirm that the biological samples had been taken, Grievant’s supervisor went to the McCabe Project site on February 2, 2011 to sample the water in the new water line.

19. Grievant’s supervisor attempted to collect samples from the new McCabe Project fire hydrant, but found the hydrant line dry. Additionally, the hydrant was not covered to indicate it was not in service as required by Petitioner’s policy. This inactive and uncovered hydrant posed a threat of harm to life and property in the immediate area until it was discovered on February 2, 2011.

20. On February 15, 2011, the McCabe Project water line at the tapping sleeve and valve was excavated. The concrete was removed and the water line and tapping sleeve and valve were exposed. The new line did not have a jumper, or taps for a jumper, the valve at the connection of the new line to the main line was closed, and the valve at the fire hydrant was only partially open.
21. Grievant was solely responsible for ensuring the contractor’s proper installation of the new McCabe Project water line including the tap, valves, jumpers, and fire hydrant. Grievant was required to be present and observe the installation, but was not. Grievant failed to perform his duties as inspector on the McCabe Project.

22. Grievant failed to log work on the McCabe Project as it was completed in to Petitioner’s ETS.

23. Grievant failed to require the use of jumpers on the new McCabe Project water line to avoid contamination of the main line.

24. Grievant failed to take any bacteriological samples of the new McCabe Project water line. Grievant’s testimony that he took samples, failed to log them, and the lab subsequently lost them, was not credible.

25. Grievant’s failure to take bacteriological samples on the new McCabe Project water line created a risk of harm to public health.

26. On March 7, 2011, Petitioner filed disciplinary charges against Grievant for his conduct. Grievant was charged with violating Civil Service Rule 6.7, No. 1 Neglect or failure to perform official duty; No. 2 Deficient or inefficient performance of duties; No. 11 Violation of any written rules, policies, or procedures of the department in which the employee is employed; No. 32 Any failure of good behavior which reflects discredit upon himself, the department and/or the Metropolitan Government.

27. Petitioner determined Grievant failed to perform disinfection protocols on the McCabe Project water line, failed to coordinate the collection of bacteriological samples with the lab, failed to document the disinfection or sampling on the McCabe Project, and
ignored or incorrectly followed fire hydrant protocols. Petitioner demoted Grievant one classification to an Engineering Technician 2 (SRO8), and reassigned him to the Planning and Development section of the engineering division.

**CONCLUSIONS OF LAW**

1. Metro Nashville’s Civil Service Rule, 6.1 provides as follows:

   An employee of the Metropolitan Government shall not engage in any criminal, dishonest, infamous, immoral, or disgraceful conduct or behavior, activity, or association which discredits him and/or the Metropolitan Government. Each employee is expected to conduct himself both on and off the job in such a manner as to reflect credit on both himself and the Metropolitan Government.

   It shall be the duty of each employee to maintain high standards of cooperation, efficiency, and economy in his work. Appointing Authorities and supervisors shall organize and direct the work of their units to achieve these objectives. When work habits, attitude, production, or personal conduct of an employee falls below an acceptable standard, supervisors should point out the deficiency at the time it is observed. Warning should precede disciplinary action, however, nothing in these rules shall prevent immediate formal action whenever the interest of Metropolitan Government requires it.

   It shall be the employee's responsibility to report to the Appointing Authority, any conviction or alternative pleading to any misdemeanor or felony violation of Federal, State or Local Law. Written notification shall be within three (3) business days or upon return to work (whichever occurs first).

   Every employee shall have the right to present his testimony or witness in a due process or grievance hearing free from fear, interference, restraint, discrimination, coercion or reprisal.

   No officer, supervisor, or employee shall consciously and by overt act deprive any person of any rights to which such person is entitled under any State law and Federal law or law, ordinance, rule or regulation of the Metropolitan Government.

   Any person, other than a member of the Civil Service Commission may request that an Appointing Authority prefer charges against an employee. As is the case with any disciplinary matter, the Appointing Authority shall make such inquiries and investigations necessary to determine if any corrective or disciplinary action should be taken.
Each employee of the Metropolitan Government shall perform his duties fairly, impartially and without discrimination on account of any of the following: race, color, national origin, sex, age, religion, disability, friendship, family or political affiliation, employee representative organization affiliation, or other organizational affiliation.

No officer, supervisor, or employee shall directly or indirectly solicit any money, service, favor or other consideration for carrying out his duties as an employee.

2. Metro Nashville’s Civil Service Rule, 6.3 provides as follows:

Any Supervisor may take corrective action by issuing a written or oral reprimand to an employee as needed. This action may be taken in an effort to correct a situation that, if uncorrected, may require disciplinary action. The employee should sign the reprimand. The signature only certifies that the employee has been shown the reprimand prior to it going in his file.

A copy of any written reprimand or notation of an oral reprimand must be placed in the employee's personnel file maintained in the department. The written reprimand or notation of an oral reprimand shall remain as an active part of the employee's departmental personnel file for a period not to exceed one year. After one year from the date of its issuance a written reprimand or the notation of an oral reprimand shall remain in the file, but will not be reflected in his annual performance evaluation. These may be used after one year to substantiate disciplinary action. Written and oral reprimands shall be removed from an employee's file after two (2) years provided no incident has taken place and is requested by the employee. The paperwork will be placed in an inactive reprimand file maintained by the Human Resources Department and may not be used to substantiate disciplinary action provided no similar incident has occurred within the two (2) year period. While written or oral reprimands are not forms of disciplinary action, an employee may state his version of the incident in writing and have it attached to the reprimand and filed in his departmental personnel file.

3. Metro Nashville’s Civil Service Rule, 6.5 provides as follows:

In the interest of good discipline, an Appointing Authority or his designee may for just cause and after proper notice and hearing take the following types of disciplinary action:

A. Suspension - An Appointing Authority may suspend an employee without pay for cause, provided that the suspension does not exceed an accumulation of 30 working days during a twelve (12) month period. Upon mutual agreement by the Appointing Authority and the employee, suspensions may be deducted from accrued vacation. The Appointing Authority or his designee shall have the discretion to determine whether or not an employee in a leave without pay status loses their vacation and sick accrual, and must notify the employee in the determination letter. To protect their exempt status, exempt employees should only be disciplined in full work week increments with the following exceptions:
1. An exempt employee may be suspended one or more full days imposed in good faith for infractions of safety rules of major significance and disciplinary reasons for infractions of workplace conduct rules. This provision refers to serious misconduct, not performance or attendance issues.
2. Such disciplinary deductions may only be made in full day increments.

B. Demotion - Disciplinary demotions include reduction in grade and/or salary; they may be temporary or full. An employee may be demoted to a lower classification with a lower salary grade or to a lower step in the same classification pay range.
   1. Temporary Demotion - Those from 30 up to 180 consecutive calendar days. An employee who receives a temporary demotion in grade may continue to be assigned his normal duties but will not be eligible for out-of-class pay for the normal classification during the period of the temporary demotion.
   2. Full Demotion - Those that are for an indefinite period. In order for a demoted employee to return to his original classification he must successfully compete in the promotional process.

C. Dismissal - An employee may be terminated from employment with the Metropolitan Government.

4. Metro Nashville’s Civil Service Rule, 6.6 provides as follows:

No suspension, demotion, or dismissal of a Civil Service employee shall become effective until due process is provided for the employee as outlined below:

- **Summary**
  1. Notification of charges in writing
  2. Informal Departmental meeting or hearing
  3. Notification in Writing of action taken (within 10 calendar days)

- **Optional**
  1. Option to meet with Department Head to present additional evidence
  2. Right to Appeal decision to the Civil Service Commission. The hearing is conducted by an Administrative Law Judge, or Hearing Officer, or the full Commission as provided for in these rules.
  3. Review of Order by full Commission

1. Notification of charges: The employee shall be notified of the charges against him. Such notification shall detail times, places, and other pertinent facts concerning the charges and should be in writing. The notification will provide for the employee to have a meeting with the Appointing Authority or designee prior to taking disciplinary action. The notification will state the mechanism through which such discussion may be arranged.

2. Departmental Meeting/Hearing: The meeting/hearing shall be informal and conducted for the purpose of explaining the department's charges against the employee, and allowing the employee's response. The manager conducting such discussions shall be an Appointing Authority or designee.
Note: The employee shall have the right to a representative. The employee shall have the right to present statements, witnesses, or any other information with regard to the charges. Attendance and participation by persons other than the manager, the employee, the employee's representative/s, and witnesses shall be at the discretion of the manager. The employee shall be able to obtain any documents and/or statements made by witnesses regarding the changes before the hearing, unless prohibited by law. If the employee or his representative declines the opportunity to have the meeting/ hearing, the provisions of this section will be deemed met.

3. Notification of action taken: The employee must be notified in writing of the action taken within ten (10) calendar days, and this notice must also advise the employee that within (10) calendar days, he may request a second meeting with the Appointing Authority to provide additional new evidence.

4. Department Head meeting (optional): An employee requesting such a meeting must do so in writing and must specify in the request what additional evidence may be brought forth. If the employee submits the additional evidence in writing, the Appointing Authority shall meet with the employee and/or his representative within ten (10) days of receiving notice or may delegate this responsibility to his second in command, provided such manager did not conduct the original meeting.

5. Appeal to the Civil Service Commission: An employee may appeal disciplinary action in accordance with section 6.8C. The notice of disciplinary action shall include a statement notifying the employee of the following appeal requirements.

6. The request must be filed within fifteen (15) calendar days of notification of the disciplinary action taken, unless the employee has filed a timely written request with the Appointing Authority to consider additional evidence. In that event the employee shall have fifteen (15) calendar days after a written response from his department to file an appeal with the Civil Service Commission.

5. Metro Nashville’s Civil Service Rule, 6.7 provides as follows:

The following constitute grounds for disciplinary action:

1. **Neglect or failure to perform official duty.**
2. **Deficient or inefficient performance of duties.**
3. Insubordination toward the supervisor.
4. Absence without notification or approval for leave.
5. Neglect or disobedience to the lawful and reasonable orders given by a supervisor.
6. Drinking intoxicating beverages, using drugs not specifically prescribed to the employee by a licensed physician or using a controlled substance while on duty, whether under the influence of the beverage, drug, or controlled substance or not.
7. Being under the influence of intoxicating beverages or drugs not specifically prescribed for the employee by a licensed physician or controlled substances when on duty or upon reporting to duty.
8. Public Intoxication while off duty, in uniform, or wearing any other evidence of being an employee of the Metropolitan Government or when driving a government owned vehicle.
9. Possession of illegal drugs or a controlled substance while on or off duty or any violation of Civil Service or departmental rules, policies, or procedures related to the substance abuse program.
10. Violation of any provision of the Metropolitan Charter or any written Executive or Administrative Orders.
11. **Violation of any written rules, policies or procedures of the department in which the employee is employed.**
12. Violation of any of the rules or regulations of the Metropolitan Civil Service Commission.
15. Conviction of a felony.
16. Inability to perform duties, when reasonable accommodation has been considered and cannot be made.
17. Neglect or failure of any employee to properly and promptly make reports or furnish information specifically required by the Civil Service Commission.
18. Excessive absenteeism and/or excessive tardiness and/or abuse of sick leave.
19. Any attempt (outside of official Commission meetings), directly or indirectly, by an employee to influence the judgment of the Metropolitan Civil Service Commission or any member thereof, with reference to any issue pending before the Commission.
20. Violation of safety rules, regulations or procedures.
21. Unauthorized sleeping on duty.
22. Damage to or loss of Metropolitan Government property caused by negligent acts of the employee.
23. Unlawful or unauthorized possession of a weapon, as defined by applicable laws, while on duty or while on Metro property.
24. Using abusive or profane language so as to create a disturbance in the work place or when directed toward a member of the public.
25. Gambling on Metro property or while on duty.
26. Falsifying employment or promotional application or any official document of Metro Government.
27. Disclosing confidential information to unauthorized persons.
28. The use or threat of violence or intimidation when directed toward another person.
29. Participation in strikes, work slow-downs, boycotts, sick-ins, picketing for the purpose of preventing others from coming to work or other similar job actions.
30. Discrimination on the unlawful basis of race, sex, color, age, religion, national origin, handicap or lawful political or employee group affiliation.
31. Participation in a pattern of harassment toward an employee of Metropolitan Government.
32. **Any failure of good behavior which reflects discredit upon himself, the department and/or the Metropolitan Government.**
33. Conduct unbecoming an employee of the Metropolitan Government. (emphasis added).
6. Metro Nashville’s Civil Service Rule, 6.8 provides as follows:

**A. INTRODUCTION**

Any employee demoted for cause, suspended, or dismissed from the Civil Service may appeal the action to the Civil Service Commission for a hearing. The proceedings or any part thereof:

1. Shall be conducted by a majority of the Commission sitting with an administrative judge or hearing officer; or
2. Shall be conducted by an administrative judge or hearing officer sitting alone, subject to review by a majority of the Commission.
3. Combined Hearings: With the agreement of all parties, an Administrative Law Judge may conduct an appeal of a suspension or temporary demotion jointly with an appeal of dismissal in those cases where the employee has been dismissed prior to the appeal of the suspension or temporary demotion having been heard. Upon agreement of all parties, the appeal of the suspension or temporary demotion may be re-assigned from the Hearing Officer/Commissioner to the Administrative Law Judge.

Cases are assigned based on the type and severity of disciplinary action imposed and subject to available funds. Specific guidelines for assigning cases, setting hearing dates, and conducting proceedings are set out in Civil Service Policy 6.8 - I, Appeal Proceedings. Any provisions in that policy may be suspended where good cause has been shown and upon majority vote by the Civil Service Commission.

In any situation that arises that is not specifically addressed by the policy, reference may be made to the Uniform Administrative Procedures Act Part 3 - Contested Cases T.C.A. 4--5--301, et seq and the Tennessee Rules of Civil Procedure for guidance as to the proper procedure to follow, where appropriate and to whatever extent will best serve the interest of justice and the speedy and inexpensive determination of the matter at hand.

**B. TIME**

In computing any period of time prescribed or allowed by statute, rule, or order, the date of the act, event or default is not to be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Except in regard to petitions for review under T.C.A. 4--5--315, 4--5--317, and 4--5--322, or where otherwise prohibited by law, when an act is required or allowed to be done at or within a specified time, the agency or the administrative judge may, at any
time, (1) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by previous order, or (2) upon motion made after the expiration of the specified period, permit the act to be done late, where the failure to act was the result of excusable neglect. Nothing in this section shall be construed to allow any ex-parte communications concerning any issue in the proceedings that would be prohibited by T.C.A. 4--5--304.

C. COMMENCEMENT OF CONTESTED CASE PROCEEDINGS

Commencement of Action - An appeal of disciplinary action must be commenced by filing Notice of Appeal with the Secretary to the Commission. Said request must be made within 15 calendar days after notification by the Appointing Authority of said action.

Answer. Any employee or former employee appealing any disciplinary action taken against him shall with his notice of appeal file an answer or statement setting forth the reason said employee is appealing.

Notice of Hearing - In every contested case, except those heard by an Administrative Law Judge from the Office of the Secretary of State, a notice of hearing shall be issued by the Secretary to the Commission. The notice shall comply with T.C.A. 4--5--307 (b). Included with the notice will be a copy of the charge and/or determination letter from the appointing authority setting out the reasons for disciplinary action and a copy of the hearing procedures to be followed. A copy of the notice will be sent to the Department of Law. Notice of hearings set before an ALJ will be issued by the Administrative Procedures Division of the Office of the Secretary of State.

Within 20 calendar days from the receipt of the Notice of Hearing a representative of the Department of Law shall file with the Secretary to the Commission formal Charges and Specifications. The Charges and Specifications shall set out the specific act(s) or event(s) leading to the disciplinary action being taken, and shall set out the specific Civil Service Commission Rules and Regulations, the Charter Provision, Executive or Administrative Order, Department Rule, or Regulation, Ordinance, Law, or other regulation violated.

D. SERVICE OF NOTICE OF HEARING

A copy of the notice of hearing must be delivered by return receipt mail or served personally on the appellant and/or his designee. No hearing shall be held, unless otherwise specified by statute, until the expiration of 30 days from service of the notice upon all parties.

Since each employee is required to keep the Civil Service Commission informed of his current address, service of notice shall be deemed complete upon placing the notice in the mail to the last known address of such party. However, in the event of a motion for
default where there is not indication of actual service on a party, the following circumstances will be taken into account in determining whether to grant the default, in addition to whether service was complete as defined above:

1. Whether any other attempts at actual service were made;
2. Whether and to what extent actual service is practicable in any given case;
3. What attempts were made to get in contact with the party by telephone or otherwise; and
4. Whether the Commission has actual knowledge or reason to know that the party may be located elsewhere than the address to which the notice was mailed.

E. REPRESENTATION

1. Any party may participate in the hearing in person or, if the party is an agency of Metropolitan Government, by a duly licensed attorney.
2. Whether or not participating in person, any party may be advised and represented at the party's own expense by a licensed attorney.
3. Attorney General's Opinion #97-164, as adopted by the Civil Service Commission on March 10, 1998, provides that a duly licensed attorney must represent all parties, who wish to have representation in hearings before the commission. All parties in a contested case hearing shall be notified of their right to be represented by counsel. An appearance by a party at a hearing without counsel may be deemed a waiver of the right to counsel.

7. The burden of proof is on Petitioner to show, by a preponderance of the evidence, that the disciplinary action was justified and appropriate. Tenn. Comp. Rules and Reg. 1360-4-1-.02, Hamilton vs. Zimmerman, 37 Tenn. 39 (1857).

DISCUSSION

The record leaves no doubt that Grievant not only failed to inspect the installation of the new service line and fire hydrant on the McCabe Project, but he also failed to ensure the line was disinfected and tested before its potential use. His lack of attention and/or concern exposed the public to risk of illness and property loss. Further, Grievant’s explanation was wholly inconsistent with the physical evidence and simply not credible. Grievant’s conduct more than justifies a demotion and reassignment. If not for his prior work history with Petitioner, it is likely Grievant would have been terminated.
CONCLUSION

Petitioner has shown, by a preponderance of the evidence, that Grievant’s conduct violated Civil Service Rule 6.7, Nos. 1, 2, 11, and 32. Grievant’s demotion and reassignment were appropriate disciplinary actions and are upheld.

IT IS THEREFORE ORDERED that Grievant’s demotion to an Engineering Technician 2 (SRO8), and transfer to the Planning and Development section of the engineering division are UPHELD.

This order entered and effective this the _______ day of April, 2012.

_________________________________
Steve R. Darnell
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 24 day of April, 2012

Thomas G. Stovall, Director
Administrative Procedures Division