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ERNEST FIELDS

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BEFORE THE COMMISSIONER FOR THE
METROPOLITAN CIVIL SERVICE COMMISSION
OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE

IN THE MATTER OF:

ERNEST FIELDS

DOCKET NO: 43.02-090460J
ADMINISTRATIVE JUDGE
WILLIAM JAY REYNOLDS

ORDER

THIS MATTER came to be heard on April 25, and April 26, 2007, before William Jay Reynolds, Administrative Judge, assigned by the Secretary of State, and sitting for the Metropolitan Civil Service Commission (“Metro”), in Nashville, Tennessee. Cynthia E. Gross, Metropolitan Attorney, represented the Commission. The Grievant, Ernest Fields, was present and represented by counsel, R. Stephen Doughty of Nashville.

THE SUBJECT of the hearing was the termination of Grievant from employment with the Metropolitan Police Department (“Department”) for violation of Metropolitan Civil Service Rules and Regulations, Policy Chapter 6.1 (for failure to provide a sufficient urine sample during a random drug test); and Rule 6.7(11) (violation of any department rule). 1 After consideration of the record and arguments of counsel, it is DETERMINED the termination should be OVERTURNED. This determination is based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

Grievant was employed with the Metropolitan Police department for ten (10) years. Since beginning employment in 1996, as a Patrol Officer, he had attained the rank of Police Officer Two. Before his termination, Grievant was serving as a School Resource Officer. His job duties were to monitor the premises of Litton Middle School, search for drugs and weapons on school property, and observe student activity entering and exiting the school facility.

On January 12, 2006, Grievant was randomly selected for drug testing via urine sampling. He cooperated and submitted a urine specimen. Grievant was not informed regarding quantitative expectation or allotted time frame for completion of the testing process. After voiding the first urine specimen, a lab technician measured the sample, informed Grievant the amount was insufficient, measuring less than the required forty-five (45) milliliters. The initial specimen was discarded and Grievant was directed to drink water and provide a second urine sample. Again, Grievant fully cooperated, repeating the entire process a second, third, and fourth attempt. Grievant recalled approximations for output measurements being as follows: First specimen, more than thirty (30) milliliters; Second specimen, at twenty (20) milliliters; Third Specimen, equal to or about twenty (20) milliliters; and Fourth Specimen, equal to or less than ten (10) milliliters. On the Fifth attempt, the allowable time frame for the testing process was expired and Grievant, without further explanation, was told he could leave.
In accordance with federal regulations, an insufficient urine sample given within the allotted time frame resulted in the collection event being terminated and the Medical Review Officer informed. The Medical Review Officer, not called to testify as a witness at hearing date, scheduled an assessment by an urologist. The purpose of the examination would determine whether Grievant had a medical reason for being physically unable to produce the required, measurable output.

On January 13, 2006, a consultative urologist, hired by the Department, examined Grievant, performed a prostate check, and received a urine sample collection. There were no x-rays, blood tests, or other objective tests performed. Grievant, without refusal to submit, cooperated with all requested testing procedures. Results from the sample collected are unclear.

The Medical Review Officer reviewed the assessment of Grievant, made by the urologist, and concluded there was no medical explanation, urological problem, or other pathology causing voiding or not voiding. According to Department policy, the test was identified as a refusal to test and treated the same as a positive. The Police Department commenced disciplinary action for Grievant and made the decision to decommission (i.e. terminate). Grievant was informed of other places to get his own drug tests. Throughout this entire process, including the urologist exam, no inquiry was made regarding prescribed medications being taken by Grievant.

Kenneth Hicks, M.D. testified, by deposition, as the treating expert and primary care physician for Grievant. Dr. Hicks indicated he had prescribed the medications Sular, Diovan, and Vytorin to Grievant in January 2006. In a letter dated February 2, 2006, Dr.
Hicks referred to Sular and Vytorin when he opined, “He (Grievant) is currently taking medications that could cause urinary retention or decreased urinary output.” Dr. Hicks reported Grievant had not complained of urinary changes; but also remarked a patient would not complain about urinary retention unless the problem caused discomfort. The physician informed, from his ten years of treating Grievant, there had been no indication of illegal drug use. He further testified Grievant had a negative attitude toward using drugs for purposes other than prescribed. No correlation with prescribed medications being taken by Grievant, at the time of testing, was explored as a possible reason for Grievant not being able to provide an adequate urine sample. Opinions of the treating physician are generally accorded greater weight when supported by objective criteria in the record. Reliance upon the opinion of the treating physician, over the contrary opinion of a consulting physician, is particularly appropriate when the severity of a claimant’s impairment fluctuates over time. *Lashley v. Secretary of H.H.S.*, 708 F.2d 1048, 1054 (1983). The reason for such a rule is clear. The treating physician has had a greater opportunity to examine and observe the patient. Further, as a result of his duty to cure the patient, the treating physician is generally more familiar with the patient’s condition than other physicians. [citation omitted].
CONCLUSIONS OF LAW AND ANALYSIS

The Court has considered the following legal authorities and precedents in making a determination and ruling in this cause:

1. *The Police Department’s General Order No. 97-12. Substance Abuse Program*, as read into the record and stating in pertinent part. . . “(B.) Mandatory Participation in the Program. In order to provide for the protection of the department and the well-being of the employees, the Department shall have the right and authority to require employees to submit to substance abuse testing. Participation in the substance abuse program is mandatory. Employees will be required to keep their scheduled appointment to participate in the screening program before being excused from their tour of duty. No action which interferes with the integrity of the process will be tolerated. Any employee found guilty of disobeying any instruction related to this procedure, or in any way providing a false or adulterated sample will be subject to disciplinary action which may result in dismissal. Refusal to submit to or avoidance of drug screening by employees will result in immediate suspension and implementation of dismissal procedures . . . (G.) Tests are ordered on a random, unannounced basis from the department pool of safety sensitive employees. At least twenty–five percent (25%) of employees in the pool will be tested annually, with selections done on a department-wide basis. Random selection is
done with a statistically valid method, such as a computer-based listing of employees by social security or employee number. An employee remains in the pool after being tested so that every employee shall have an equal chance of being tested each time selections are made. Any employee notified by his or her supervisor to report for a controlled substance and or alcohol test must go immediately to the collection site.” The Grievant’s participation in the program is mandatory and he was properly subjected to the urinalysis randomly. It appears the Department followed procedures as prescribed by 49 Code of Federal Regulations § 40.193. The Department indicated that it had no reasonable suspicion that he had violated the Department’s substance abuse policy.

2. The Police Department’s General Order No. 97-12. Substance Abuse Program, § X. Consequences of a Positive Test. (A.) Refusal to Test. “Any refusal to submit to a test shall be considered a positive test. Willful refusal to test, or an attempt to tamper with the test, is in violation of this policy and will subject an employee to disciplinary action. Refusal to submit may include failure to provide an adequate breath or urine sample for testing unless medical reasons are confirmed for a sample not being provided.” There is a fundamental difference in the words “may” and “shall”. The use of the word “shall” in legislation is indicative of a mandatory legislative intent. State v. Lowe, 811 S.W.2d 526 (Tenn. 1991). By contrast, use of the word “may” is generally regarded as discretionary rather than mandatory. Baker v Seal, 694 S.W.2d 948 (Tenn. App. 1984). Pursuant to Section 12.05 of the Metropolitan Charter: “Any employee terminated from the classified service . . . by his simple written request to this commission, shall have the action reviewed by the commission. If the commission does
not approve the action, it may modify or reverse it, and provide whatever recompense is indicated, which shall not exceed net loss of earnings. In a review by the commission of any disciplinary action, the disciplining authority shall bear the burden of proof of just cause for discipline.” Accordingly, it was incumbent on the Department, in exercising discretion, to demonstrate the reason it choose to characterize the Grievant’s inability to perform the test as a refusal. It is impossible to determine whether the decision was honest judgment or mechanical application of a discretionary function. The Grievant complied, repeatedly, with every request and directive of his superiors, and was agreeable to catherization. On the initial request, the Grievant was neither informed as to the amount of urine to be produced not the allowable amount of time for the testing.

In this case, it makes as much sense to say the Grievant would not have produced any urine if he was refusing the test. The record is silent as to whether he knew every attempt would be discarded. The *McDonnell v Hunter*, 809 F.2d 1302 (8th Cir. 1987) Court acknowledged, what should be every government’s concern, that there exists “...a strong need to see that prison guards are not working while under the influence of drugs or alcohol, safety concerns dictating that prison security personnel who have contact with inmates be alert at all times, and that drug use by a correction officer is some positive indication that such officer may bring drugs into the prison for the use of the inmate...” By analogy, the Department should be vigilant in testing Public Health and Safety (PHS) sensitive positions; and was correct in this instance to test. Additionally, the Department correctly followed standard operating procedures for administering the test. However, as this case indicates, giving notice to the employee of the amount of urine necessary and
the amount of time in which to perform would be the better practice. Particularly, after it is determined whether the employee is taking any prescription medications that would interfere with the production of the specimen.

Here, the uncontradicted evidence is that the Grievant was not questioned as to whether he was on any medication that might affect his ability to perform the exam. The Grievant’s primary care physician testified to urinary retention being a possible side effect of the medications prescribed for the Grievant. Further, the Grievant testified he experienced urinary retention while on the medication and stated he informed the Department’s consultative urologist of this fact; which appears to be ignored by the Department. The Department offered no reasons why it chose to construe the repeated efforts of the Grievant as “inadequate” and characterized same as synonymous with a “failure to test.” The Department’s action of termination and rigid interpretation, in this case, of the discretionary language found in the General Order, is without fair and substantial reasoning and appears patently unfair and unreasonable under the circumstances.

3. **Civil Service Policy, Substance Abuse Policy 6.1.** Provides in pertinent part:

“GENERAL. It is the policy of Metropolitan Government to maintain a workplace that is free from the effects of drug and alcohol abuse. To ensure that employees comply with this policy, Metropolitan Government will pursue all reasonable and lawful means to enforce this policy. All employees are included under this policy. Police Department employees are subject to the department’s General Duty Order. Specifically, it is the policy of the Civil Service
Commission that: A.) It is prohibited for any employee to sell, distribute, use, or possess illegal controlled substances on or off duty. B.) It is prohibited for any employee to use alcohol or legal drugs in a manner that might interfere with the employee’s performance of duties. C.) This policy authorizes testing of an employee who has been involved in a critical incident as defined by this policy, and testing of an employee when there exists a reasonable suspicion that the employee has engaged or is engaging in prohibited conduct under this policy. D.) Any employee found in violation of these provisions may be subject to disciplinary action in accordance with the Civil Service Rules. E.) In accordance with the Drug-Free Workplace Act of 1988, employees must notify the Appointing Authority of any criminal drug statute conviction occurring in the workplace within five workdays after the conviction. All employees covered under this policy are subject to Reasonable Suspicion and/or Critical Incident testing for controlled substances and alcohol. D.) Random Employees in CDL and PHS positions are subject to drug and alcohol tests which are ordered on a random, unannounced basis. Random selection is done with a statistically valid method. An employee’s name remains in the pool after being tested each time selections are made in order to ensure that every employee shall have an equal chance of being tested each time. When randomly selected, the employee will be notified by his/her supervisor to report immediately for a controlled substances and/or alcohol test . . . (I.) PERSONS TO BE TESTED . . . (B.) Public Health & Safety Positions. Employees in Public Health and Safety (PHS) sensitive positions that are responsible for the health, safety and welfare of the general public and their fellow employees are also subject to random testing for controlled substances and alcohol. They
have an obligation to work free of impaired judgment or physical ability so as to avoid injury to themselves, other employees or the public, and to maintain credibility and the trust of the public. Public Health and Safety sensitive category employees are broadly defined as:

· Non-CDL Drivers
· Water Treatment Personnel
· Hazardous Duty Workers
· Security & Related Law Enforcement (emphasis added)
· Fire, EMS & Related Support Personnel
· Care Givers

. . . (VII.) Consequences of a Positive Test. A.) Refusal to Test. . . Willful refusal to submit to a test, or any attempts to tamper with a test, is in violation of this policy and will be treated as a positive test. Refusal to submit may include failure to provide an adequate breath or urine sample for testing, unless medical reasons are confirmed.”

The Grievant gave repeated urine samples, the cumulative amount of which would exceed the 45 milliliter requirement. At no point did Grievant refuse to provide a urine sample. The inference being Grievant was unable, not unwilling, to take the test.
DECISION

THEREFORE, the Court finds, by a preponderance of credible evidence the Department failed to carry the burden of proof for demonstrating the Grievant, under the rules, refused to submit to appropriate testing pursuant to the substance abuse policy and; the Department failed to fully investigate and consider the evidence of mitigating circumstances which would have established the Grievant was unable, not unwilling, to take the test. The Grievant should be immediately reinstated with full back pay and benefits.

ORDERED AND ENTERED this 6th day of November, 2007.

____________________________________
WILLIAM JAY REYNOLDS
ADMINISTRATIVE JUDGE

FILED in the Administrative Procedures Division, Office of the Secretary of State, this 6th day of November, 2007.

THOMAS G. STOVALL, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION