10-17-2007

Metropolitan Government Department of Parks and Recreation, Petitioner, vs. Teddy R. Frazier, Grievant/Appellant.

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IN THE MATTER OF: )
Metropolitan Government )
Department of Parks and Recreation, )
Petitioner, )
Docket No. 43.02-095968J )

v. )
Teddy R. Frazier, )
Grievant/Appellant. )

INITIAL ORDER

This contested case came on to be heard on October 17, 2007 in Nashville, Tennessee, before Administrative Judge Joyce Grimes Safley, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Metropolitan Government of Davidson County Civil Service Commission. Mr. Jon Michael, Attorney, Department of Law, Metropolitan Government of Nashville and Davidson County (hereinafter “Metro”) represented the Department of Parks and Recreation. The Grievant, Teddy R. Frazier, was present and was represented by Ms. Amanda Thornton and Mr. Larry Roberts of the Nashville Bar.

The transcript of this hearing was filed with the Administrative Procedures Division on November 27, 2007, with the parties filing “Proposed Findings of Fact and Conclusions of Law” on December 13, 2007 (Grievant) and December 20, 2007 (Metro).
The subject of this hearing was Grievant’s appeal of a five day suspension without pay for his alleged violation of the Civil Service Rules of the Metropolitan Government of Nashville and Davidson County, Chapter 6, §6.7, No. 4 -- “Absence without notification or approval for leave”\(^1\). Grievant was given this five day suspension for failure to comply with Director Roy Wilson’s letter of May 11, 2007 ordering Grievant to return to work at the start of his next shift, or provide a physician’s statement indicating that he was medically incapable of working.

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that the Grievant did violate Chapter 6, §6.7, No. 4 of the Civil Service Rules of the Metropolitan Government of Nashville and Davidson County. It is further determined that the appropriate discipline for Grievant is a two (2) day suspension without pay.

Accordingly, it is therefore ORDERED that Grievant be suspended two (2) days without pay, and be reimbursed back pay for the other three days of the suspension.

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\(^1\) There was much testimony at the hearing regarding Grievant’s completing a Family Medical Leave Act” (FMLA) request, whether the FMLA form had been completed or not, whether the FMLA was completed properly, etc. According to James Gray, Assistant Director for Finance and Administration of the Metro Parks and Recreation Department, “Mr. Frazier’s action resulted from his noncompliance with the director’s letter, not because there was mistakes made or misunderstanding made regarding his FMLA paperwork specifically.”
FINDINGS OF FACT

1. Grievant, Teddy Frazier, has been employed as an Electrician with the Metro Parks and Recreation Department for almost thirty years. His job is a civil service position.

2. No evidence was presented that Grievant had any previous discipline issues. Nor was any evidence submitted (via performance evaluations, etc.) that Grievant was a poor employee. Rather, in Assistant Director Bays’ April 25, 2007 letter to Grievant, Bays stated: “You are a valuable asset to the department and we look forward to meeting with you.”

3. During February and March 2007, Grievant began suffering from an illness or medical condition.


5. Grievant called in sick and took sick leave on March 2, 5, 7, 8, 9, 12, 13, 14, 21, 23, and 31, 2007.


7. Grievant sent a letter via facsimile from his physician to his supervisors, Mike Bays and Kenneth Jones at Metro Parks and Recreation. The letter from Glenn Booth, Jr. M.D. was dated March 7, 2007. It states as follows:

   This pt [patient] has (R) [right] flank pain x [times] 1 week. Evaluation underway.
Pt missed work Fri. 3/2/07 & Mon 3/9/07 & 1 hr today. He is to remain off work until released ----Pending outcome (sic) of current studies.

8. From all the evidence presented, Grievant’s supervisors were agreeable with Grievant’s taking sick leave after receiving Dr. Booth’s letter.

9. The problems began when Grievant Frazier came back to work, off and on, during March and April, 2007.

10. Despite not having his physician’s release to return to work, Grievant returned to work and worked on March 15, 16, 17, and 20, 2007. Grievant took sick days March 21, 22, and 23, 2007. Then Grievant returned to work on March 26, 27, 29, and 30, 2007. Grievant was granted sick or annual time for all of the sick days he took during this time.

11. Kenneth Jones, District Supervisor of Maintenance, Metro Parks and Recreation, was Grievant’s direct supervisor.

12. When Grievant began coming into work sporadically, Mr. Jones assumed that “once he [Frazier] came back to work after we got [the doctor’s letter] I figured he was released, but he was - - I knew he was still sick and we would still grant him sick leave.”

13. Grievant testified that he was trying to save his sick time, so he went back to work at times during March 2007 and April 2007 and “did what he was physically able to do.” Grievant further testified that he “was functioning at a lower level at work”.

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14. Part of Grievant’s job responsibilities included driving a Metro Parks & Recreation truck to job sites. On several days, Grievant told his supervisors that he did not feel like driving the truck.

15. Grievant testified that he was on medication and couldn’t drive his truck at work some days.

16. Grievant was taking 10 mg Valium while at work, then had his medications changed to Xanax 2mg four times per day. It is judicially noticed that Valium and Xanax are both tranquilizers and anti-anxiety medication which can cause drowsiness and carry warnings against driving or operating machinery while using the medication. It is also judicially noticed that Grievant’s Valium and Xanax dosages are not low dosages of these medications.\(^2\)

17. Assistant Director Bays noted that on the days Grievant appeared at work, he did not perform his usual work duties. Assistant Director Bays testified, credibly:

[\textit{W}hat occurred during March and April, Mr. Frazier would come to work and not go to work. Basically, he would hang around the shop and not perform his duties.]

\(^2\) Rule 201 of the \textit{Tennessee Rules of Evidence} provides, in pertinent part:

\textbf{Judicial Notice of adjudicative facts.---}

(b) Kinds of Facts. ---A judicially noticed fact must be one not subject to reasonable dispute, in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary ---A court may take judicial notice whether requested or not.
18. Supervisor Jones testified: “He [Frazier] said that he thought it would be better to come in and do what he felt like doing. When I say ‘felt like’, it was what he was physically capable of doing. He [Frazier] said he felt like it was better than not coming in at all.”

19. Supervisor Jones also testified:

I would give him work orders, and, you know, they’d come back there still working or incomplete or something. I’d ask him[Frazier] and he’d say, “Well, you know, I didn’t feel good or I was late getting out because I took medication and didn’t leave, you know, early enough.”

20. On April 17, 2007, Supervisor Kenneth Jones met with Grievant to discuss Grievant’s sick days, and the days when Grievant came to work but did not perform his job duties at an acceptable level.

21. At the April 17, 2007 meeting, Supervisor Jones told Grievant Frazier that if Grievant couldn’t work or couldn’t come to work and be able to do an acceptable job, he should take “sick time.” Jones went on to tell Grievant “that’s what sick time is for.”

22. At the April 17, 2007 meeting, Supervisor Jones instructed Grievant to complete a Family and Medical Leave Act form to request FMLA leave.3

23. At the hearing, Grievant testified that Supervisor Jones met with him on April 17, 2007 and said, “We’ve discussed your situation...It would be

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3 It is noted that the Civil Rules of the Metropolitan Government of Nashville and Davidson County, Appendix provides that FMLA leave may be taken because an employee is seriously ill and unable to work. “Serious health condition” means an illness, injury, impairment, or physical or mental condition that involves... “any period of incapacity requiring absence of more than three calendar days from... work that also involves continuing treatment by (or under the supervision of) a health care provider.”
best for you to go home. You got plenty of sick time. Don’t worry about it until your medical problems are over with.”

24. Supervisor Jones then instructed Grievant to go to Ms. Crenshaw in the personnel department and fill out FMLA paperwork.

25. Grievant completed the FMLA paperwork on April 17, 2007 and sent it back in to personnel. However, on the FMLA Request form, Grievant did not check any of the boxes for type of leave requested. Rather, Grievant made the notation: “Didn’t ask for leave”. In the space provided on the form for “Reason for Leave”, Grievant wrote:

Because my boss Kenneth Jones told me that Him & Mike Bays decided this. I never requested this time off they made their decision on their own that is what Kenneth Jones’ to blame.

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I didn’t ask for any leave they made me go home.

/s/ Teddy Ray Frazier, Sr. Date: 4/17/07

26. On April 25, 2007, Assistant Director Mike Bays sent a letter to Grievant which states, in pertinent part:

On Tuesday, April 17, your supervisor, Kenneth Jones, met with you, and the two of you discussed how your work had not been at an acceptable level recently and you were asked why. A specific example was given where Mr. Dearhorff, a co-worker, had been used as your unauthorized driver for the day because you said you felt “too bad” to drive the truck. The amount of work accomplished that day was minimal and unacceptable....Mr. Jones informed you that since you have available sick leave that it would be a good idea to request time off from work for treatment and recovery until you could fully perform your job duties. You were instructed to bring a statement from your doctor if you decided to request time off. You were further instructed to fill out the FMLA paperwork after you had indicated that you would be off. We have not received any of these documents as of today.
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It has also come to my attention that you are on a prescribed medication that states that it may cause you to be unable to drive or operate machinery. You have stated that on some mornings you do not feel it would be safe to drive after taking the medication and have used this as a reason for staying in the shop and not starting your workday for up to two hours or more.4

27.   Assistant Director Bays ended the April 25, 2007 letter by urging Grievant to meet with him and Supervisor Jones to “address all of these issues”

28.   After the April 17, 2007 meeting with Jones, Grievant did not return to work nor did he communicate with his supervisors.5

29.   On April 27, 2007, Dr. Booth signed and completed the medical portion of Grievant’s FMLA documents (the Certification of Health Care Provider form).

30.   It is not clear when Metro’s Human Resources department received the signed “Certification of Health Care Provider” form. The handwritten responses on the “Certification of Health Care Provider” form include: “Pt unable to perform duties of regular occupation when fla [illegible]” and “not aware of patient’s job functions”.

31.   On May 11, 2007, Roy Wilson, Director of Metro Parks and Recreation, sent a letter to Grievant. The letter stated, in relevant part:

4 While not determinative, it is understandable why Grievant’s supervisors were concerned about his driving a Metro vehicle, and/or working on electrical wiring and electrical systems when he was on medication which could impair his ability to drive or work with machinery.

5 Asst. Director Gray testified that he tried to call Grievant Frazier but was unable to reach him. Gray further testified that he received after hour voice mail messages from Grievant. Grievant testified that he had no face to face conversations or “in-person/live” telephone conversations with Supervisor Jones or Asst. Director Bays after the April 17, 2007 meeting. Grievant stated: “No…like I stated earlier, I was told to go home, and him and Mike Bays made the decision. At that time I didn’t think there was really no other stuff to discuss. I was told to go home. I done what I was told.”
It has been brought to my attention that you have been off from work for the greater part of March and April of 2007 (a total of 264 hours). According to our records, you were instructed to provide information from a doctor to accompany a request for Family Medical Leave Act...[.] To date we have not received any request from you related to taking leave.

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Upon receipt of this letter you are directed to return to work at the start of your next shift. Unless you have a doctor’s statement indicating that you are medically incapable, you will be expected to perform your regular job duties as outlined by your functional job description.

32. Grievant did not return to work as directed. Nor did Grievant communicate with any of his supervisors to request leave or supply them with a physician’s excuse.

33. On May 18, 2007, Director Wilson sent a letter to Grievant. The letter advised Grievant that a Chapter 6, Disciplinary Action departmental hearing would be conducted on May 24, 2007 regarding his absence from work without notification or approval for leave.

34. Grievant made no communications with his supervisors.

35. On May 21, 2007, Director Wilson received a fax from Sam Castellani, M.D., regarding Grievant. The handwritten statement said:

T.W.I.M.C.:

Mr. Teddy R. Frazier [DOB and social security number omitted] is currently not able to work at his usual occupation nor attend the proposed hearing on May 24, 2007, due to the condition for which I am treating him.

Sincerely,

/s/ SCastellani

36. Director Wilson sent a letter to Dr. Castellani on May 21, 2007 (copied to Grievant and Asst. Director Bays), advising Dr. Castellani that
Grievant had not taken the appropriate steps to request leave. Director Wilson went on to state: “....I cannot honor your handwritten statement to excuse Mr. Frazier from reporting or attending the departmental hearing scheduled for May 24, 2007...”. Director Wilson added: “To date, Mr. Frazier has not submitted the requested paperwork and is in noncompliance with the Civil Service Rules.”

37. After receipt of the May 24, 2007 letter, Grievant did not telephone or communicate with Director Wilson or his supervisors.

38. On May 24, 2007, the departmental hearing was held as scheduled. Grievant did not appear at the hearing, nor did anyone appear on Grievant’s behalf.

39. By letter of May 25, 2007, Director Wilson notified Grievant that the departmental hearing had taken place without Grievant in attendance, with the panel recommending that Grievant be suspended for five (5) days without pay. Director Wilson went on to say that he agreed with and approved the panel’s recommendation to discipline Grievant with a five day suspension. Finally, Director Wilson directed the Grievant to return to work at the beginning of his next shift, scheduled for May 29, 2007. The letter further advised that if Grievant did not report to work for his next shift, new charges would be submitted against Grievant.

40. Grievant was not disciplined for his absences prior to Director Wilson’s May 11, 2007 letter.

41. Thereafter, Grievant timely appealed this matter.
CONCLUSIONS OF LAW

1. The Civil Service Rules of the Metropolitan Government of Nashville and Davidson County govern this matter. Additionally, the Tennessee Administrative Procedures Act also applies to this case. See Civil Service Rules of the Metropolitan Government of Nashville and Davidson County, Chapter 6.7

2. Rule 6.8(A)(3) of the Civil Service Rules of the Metropolitan Government of Nashville and Davidson County, provides, in pertinent part:

   In any situation that arises that is not specifically addressed by the [Civil Service] 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.


4. Metro Department of Parks and Recreation bears the burden of proof in this matter to show, by a preponderance of the evidence, that Grievant violated the Department’s written rules, policies, or procedures; and that the discipline imposed, a five day suspension without pay, was the appropriate discipline for his violation of such rules. See Civil Service Policies of the Metropolitan Government of Nashville and Davidson County, Chapter 6.8 A-1 (M).
5. The first question which must be asked is whether Grievant violated rules or regulations of the Metropolitan Government which would subject him to discipline.

6. Chapter 6, §6.7 of the Civil Service Rules of the Metropolitan Government of Nashville and Davidson County sets forth grounds for disciplinary action of civil service employees. Included in the grounds for disciplinary action is No. 4 -- “Absence without notification or approval for leave.”

7. The May 11, 2007 letter from Director Wilson directed Grievant to return to work on his next scheduled shift, or to submit a physician’s statement indicating that he was medically incapable of returning to work. The letter went on to state: “You will be expected to perform your regular job duties as outlined by your functional job description.”

8. Grievant did not return to work on his next scheduled shift. Grievant did not submit a physician’s statement indicating that he was medically incapable of returning to work. Nor did Grievant telephone any of his supervisors to discuss the situation. Rather, Grievant did nothing.

8. On May 18, 2007, Grievant received a letter from Director Wilson advising Grievant that he was absent without leave and a departmental hearing would take place on May 24, 2007.

9. Despite this, Grievant still did not contact Director Wilson or his supervisors regarding his leave.
10. On May 21, 2007, Grievant had a session with his physician, Dr. Castellani. Dr. Castellani faxed a statement to Director Wilson excusing Grievant from working or attending the scheduled May 24, 2007 hearing.

11. Regardless of the fact that Director Wilson clearly communicated, via letter, that he would not accept Dr. Castellani’s “excuse” without a request or communication from the Grievant, Grievant did not communicate with either Director Wilson or his supervisors about his absence from work.6

12. A reasonable person in Grievant’s situation would have felt some obligation to talk with his supervisors regarding his absence. Had Grievant done so back in April 2007, Grievant could possibly have avoided disciplinary proceedings.

13. Instead, Grievant was silent, and disregarded a direct order from the Director of Parks and Recreation.

14. The testimony given by Asst. Director Bays, Supervisor Jones, and Asst. Director Gray is deemed credible.

15. The Metro Department of Parks and Recreation has proved, by a preponderance of the evidence, that Grievant violated Rule No. 4 -- Chapter 6, §6.7 of the Civil Service Rules of the Metropolitan Government of Nashville and Davidson County “Absence without notification or approval for leave.”

16. Having determined that Grievant violated the above-referenced rule, the next question which needs to be asked whether there was “just cause”

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6 It is not clear when Grievant submitted his certification from Dr. Booth. However, Grievant cannot be said to have requested leave when his FMLA form clearly states that he is not requesting leave.
for a five day suspension, or what discipline is appropriate for Grievant’s violation.

17. An employee’s prior conduct, both good and bad, along with his entire work history, can be considered when determining what the appropriate disciplinary action should be. Kelly v. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. 1999).

18. An additional consideration for determining the appropriateness of the discipline to be imposed is whether the punishment imposed upon the Grievant is different than discipline used with other employees who have engaged in the same conduct. Gross v. Gilless, 26 S.W.3d 488, 495 (Tenn. Ct. App. 1999), Perm. To Appeal Denied (Tenn. 2000). Neither party introduced evidence regarding other employees engaging in the same conduct as Grievant, or what discipline, if any, was imposed upon such other employees.

19. In considering the appropriate discipline for Grievant, it is noted that Grievant was considered “an asset to the department”. Grievant had no previous disciplinary actions. Grievant has been employed by Metro for almost thirty years.

20. Grievant used poor judgment by not talking directly to his supervisors and attempting to resolve this matter before Director Wilson became involved and ordered Grievant to report back to work. Grievant used even more poor judgment by disregarding Director Wilson’s directive to return to work or supply a proper leave request.
21. In Grievant’s defense, Grievant did eventually have Dr. Castenalli fax Director Wilson an “excuse” stating that Grievant was unable to work or to attend the departmental hearing. However, Director Wilson made it clear that he would not accept the doctor’s “excuse” without a proper request from Grievant.

22. Grievant’s failure to attend the departmental hearing, or to even communicate personally that he would not be attending the departmental hearing, was a poor course of action which probably did little to ingratiate him to his supervisors or help his situation.

23. Considering all the facts and circumstances of this case, it is determined that Grievant should be disciplined for his violation of Metro Civil Service Rules Rule No. 4 -- Chapter 6, §6.7 “Absence without notification or approval for leave.” There is “just cause” for disciplining the Grievant.

24. In light of Grievant’s past work history, the fact that Grievant was suffering from an illness requiring medications, and the fact that Grievant eventually supplied statements from his physicians, the appropriate discipline for Grievant is a two (2) day suspension without pay.

25. The undersigned does not believe that Grievant’s failure to comply with the Director’s order should be rewarded with no disciplinary action taken.

Accordingly, it is hereby ORDERED that Grievant’s suspension REDUCED FROM FIVE (5) DAYS WITHOUT PAY TO TWO (2) DAYS WITHOUT PAY. GRIEVANT SHALL BE REIMBURSED FOR THE THREE DAYS HE WAS SUSPENDED WITHOUT PAY.
It is so ordered.

Entered and effective this 11th day of February, 2008.

[Signature]

Thomas G. Stovall, Director
Administrative Procedures Division