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Charles Yancey vs. Metro Civil Service

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June 30, 2015

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Charles Yancey
130 St. Andrews Drive
Hendersonville, TN 37075

RE: In the Matter of: Charles Yancey

Docket No. 43.02-127934J

Enclosed is an Initial Order rendered in connection with the above-styled case.

Administrative Procedures Division
Tennessee Department of State

/aem

cc: Lou Sorrow, Metropolitan Civil Service Commission

**BEFORE THE METRO CIVIL SERVICE COMMISSION OF THE METROPOLITAN
GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY**

IN THE MATTER OF:

CHARLES YANCEY

DOCKET NO. 43.02-127934J

NOTICE

ATTACHED IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BE REVIEWED BY THE CIVIL SERVICE COMMISSION:

A PARTY MAY FILE A PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN **July 15, 2015**.

YOU MUST FILE THE PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
WILLIAM R. SNODGRASS TOWER
312 ROSA PARKS AVENUE, 8th FLOOR
NASHVILLE, TENNESSEE 37243-1102

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, **615/741-7008 OR 741-5042, FAX 615/741-4472**. PLEASE CONSULT APPENDIX B AFFIXED TO THE INITIAL ORDER FOR NOTICE OF REVIEW PROCEDURES.

**BEFORE THE CIVIL SERVICE COMMISSION OF THE METROPOLITAN
GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY**

IN THE MATTER OF:

CHARLES YANCEY

Grievant.

DOCKET NO: 43.02-127934J

INITIAL ORDER

This contested case came on to be heard on January 29, 2015, in Nashville, Tennessee, before Administrative Judge Kim Summers, assigned by the Tennessee Secretary of State, Administrative Procedures Division, to preside in this matter on behalf of the Civil Service Commission of the Metropolitan Government of Nashville and Davidson County (“Metro”). Mr. Johnathon P. Michael, Assistant Metropolitan Attorney, represented Metro. The Grievant, Mr. Charles Yancey, was present and represented himself. The subject of this hearing was the Grievant’s appeal of his termination for failing to participate in a urine drug test.

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that Metro has proven an appropriate basis for the termination of the Grievant’s employment, by a preponderance of the evidence.

This decision is based upon the following findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

The following individuals provided testimony at the hearing on behalf of Metro – Jennifer Johnson, Human Resources Management for the Department of General Services for Metro; Stephen Cain, Metro Human Resources. Grievant testified on his own behalf that he did not willfully refuse to participate in the test, that the entire situation resulted from lack of sleep and the medications that he had been prescribed for his medical conditions, and that termination was not necessary or appropriate.

The following eleven exhibits were entered into evidence during the hearing: EXHIBIT 1, color photographs of the Grievant at the office; EXHIBIT 2, Substance Abuse Policy; EXHIBIT 3, August 18, 2014 Documentation of Reasonable Suspicion of Substance Abuse; EXHIBIT 4, color photographs of the Grievant at Aegis; EXHIBIT 5, August 27, 2014 Email from Stephen Cain; EXHIBIT 6, August 27, 2014 Due Process Letter; EXHIBIT 7, September 3, 2014 Termination Letter; EXHIBIT 8, September 29, 2014 Reconsideration Letter; EXHIBIT 9, Section 6.6 – Due Process; EXHIBIT 10, Section 6.7 – Grounds for Disciplinary Action; EXHIBIT 11, Substance Abuse Policies signed by the Grievant.

FINDINGS OF FACT

1. Charles Yancey has been employed by Metro General Services since at least 2004.
2. On August 18, 2014, Jennifer Johnson received a voicemail from the Grievant about his work schedule. His speech was slurred and unusually slow.
3. Ms. Johnson arrived at the Grievant's work location around 9:15 a.m. and found him asleep at his desk.
4. Ms. Johnson contacted Brian Pate, as the Trained Supervisor, to help make the determination whether the circumstances warranted "reasonable suspicion" drug testing.
5. Together, Ms. Johnson and Mr. Pate asked the Grievant three times to wake up.
6. Upon waking, the Grievant was unsteady on his feet, his eyes were bloodshot, his thoughts appeared muddled, and his speech was slow and slurred.
7. The basis for reasonable-suspicion drug testing was also confirmed with Stephen Cain, Safety and Occupational Risk Manager for Metro's Central Human Resources Office.
8. The reasons for the drug testing were appropriately documented, and the testing was approved by the Appointing Authority.
9. Ms. Johnson and Mr. Pate escorted the Grievant from the building into a Metro vehicle. Mr. Pate and Ms. Johnson drove the Grievant to the Aegis facility, used for drug testing Metro employees, and then escorted him into the building.

10. The Grievant fell asleep while standing in line and was asked to have a seat while Ms. Johnson registered him for his drug screening test. He fell asleep again while waiting for his turn.

11. The Grievant remained in the facility for the maximum time allowed By Metro policy, approximately three hours, trying to provide a urine sample. He was asked to drink water but spent most of the time asleep. After several failed attempts, he was ultimately unable to provide a sufficient sample for testing.

12. Mr. Pate and Ms. Johnson drove the Grievant back to his work location and then, after transferring to the Grievant's vehicle, drove the Grievant to his home.

13. The Grievant made several comments on the day in question about providing a "dirty" sample.

14. Because the Grievant did not provide the necessary urine sample, the matter was transferred to a medical review officer (MRO) to determine whether the failure should be deemed a refusal to test or if there was a medical reason making the Grievant unable to test.

15. The Grievant was placed on administrative leave with pay during the review process.

16. The Grievant was taking many medications for multiple medical conditions. This information was provided to the MRO. Based on this information and a physical examination, the MRO determined that no medical reason justified the Grievant's failure to produce a urine sample, which was classified as a refusal to test. This determination was provided to Mr. Cain, who shared the results with Ms. Johnson.

17. Pursuant to policy, Metro is not involved in the review process, and, therefore, was not privy to any of the Grievant's medical information, only the ultimate determination made by the MRO.

18. Pursuant to Metro policy guidelines, a refusal to test is treated the same as a positive test, which typically results in the termination of employment.

19. The Grievant was recommended for termination. Following a departmental meeting held on September 3, 2014, the Grievant's employment with Metro was terminated. The termination

was upheld following a second meeting held on September 22, 2014. This appeal to the Civil Service Commission resulted.

21. The grounds provided for the Grievant's termination are as follows – insubordination toward the supervisor; neglect or disobedience to the lawful and reasonable orders given by a supervisor; any failure of good behavior which reflects discredit upon himself, the department and/or the Metropolitan Government; conduct unbecoming an employee of the Metropolitan Government; and willful refusal to submit to a test.

22. The Grievant signed an Acknowledgement of Receipt and Understanding of the Substance Abuse Policy in 2004, 2005, 2009, and 2013.

RELEVANT LAW

Relevant portions of Metro's Substance Abuse Policy provide the following guidelines –

I. 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.

II. PERSONS TO BE TESTED

All employees covered under this policy are subject to Reasonable Suspicion and/or

Critical Incident testing for controlled substances and alcohol.

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
- Fire, EMS & Related Support Personnel
- Care Givers

III. Tests Required

Test for alcohol and controlled substances are required for the circumstances listed below.

A. Pre-appointment

Employees required to hold a CDL and employees in a PHS position will be tested after a provisional offer of employment has been made but prior to performing job duties. Tests must also be completed before an employee is promoted, transferred or assigned to a CDL or PHS position and upon return to work when an employee has been on leave or otherwise not performing the required duties of these positions for a period of six months or longer.

B. Critical Incident

Alcohol and controlled substances tests will be conducted after an accident involving an employee, which results in: (1) a fatality; (2) bodily injury which requires immediate medical treatment away from the scene of the accident, or (3) where one or more vehicles incur disabling damage requiring the vehicle to be towed away from the scene and the employee receives a citation under state or local law for a violation arising from the accident.

Tests should be done as soon as practical after the accident although there should be no delay in any medical treatment required. Controlled substances and alcohol tests should be completed within two hours of the accident. If circumstances prevent adhering to this time limitation, the employee must immediately contact the Appointing Authority or his/her designee to request a time extension.

Any employee commissioned to carry a firearm shall be required to submit to drug testing after any discharge of the firearm involving death or personal injury, and shall be required to report to the collection site as soon as possible following the incident or as directed by the Appointing Authority or his/her designee.

An employee may be ordered to test at any time force is used that is reasonably calculated to produce death or serious bodily injury.

C. Reasonable Suspicion

An employee is subject to reasonable suspicion testing when after review of the specific facts and circumstances in a particular employee's case, a trained supervisor concludes that there exists a reasonable suspicion that an employee has engaged or is engaging in conduct prohibited under this policy. Trained supervisors must document these conclusions on the approved reasonable suspicion form. The Appointing Authority or his/her designee will review this documentation and any other pertinent information. If the designated authority agrees with the documented findings of the trained supervisor, the employee shall submit to a controlled substances and/or alcohol test.

No employee shall be allowed to drive or perform any health or safety function when suspected of being impaired until a test reports that the employee is qualified to work.

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.

E. Return to Duty and Follow-up Testing

Return to Duty. An employee who has tested positive under this policy, and who is allowed to return to work, is subject to further testing under the terms of the employee's Return-to-Work Agreement. Specifically, the employee shall present negative test result(s) before returning to work, and shall be subject to follow-up testing.

Follow-up. Following a determination that an employee is in need of assistance in resolving problems associated with the use of alcohol or controlled substances, the employee is subject to unannounced testing under the terms set by the employee's Return-to-Work Agreement.

There must be at least six (6) unannounced tests within the first twelve (12) months after an employee returns to work. The length of time an employee is subject to follow-up testing, and the number of tests required beyond the minimum six tests required is determined by the Substance Abuse Professional or Employee Assistance Counselor and shall not exceed sixty months.

IV. Medication

Employees are required to immediately report to their supervisor the use of prescription or over-the-counter medications that could impair the employee's ability to perform his/her duties safely.

V. How Tests Will Be Done

A. Alcohol

Alcohol is defined as any food, beverage, mixture or preparation, including any medication, containing ethyl alcohol. Testing for the use of alcohol will be done using approved screening or evidential breath testing (EBT) devices approved by the federal government. Testing requirements for alcohol is in compliance with U.S. Department of Transportation regulations. A screening test will be conducted first and a result 0.040 g/dL or greater is considered positive. Although not considered a positive test, a CDL holder or an employee in a PHS position shall be removed from driving and/or performing a PHS function with an alcohol concentration of 0.020 to 0.039 g/dL, and is subject to retesting and possible referral to a substance Abuse Professional (SAP) for assessment. Metro Government reserves the right to order a blood test by gas chromatography as additional confirmation in extraordinary circumstances.

B. Controlled Substances

Testing for the illegal use of controlled substances will be done by urinalysis. Pre-appointment and Random testing for controlled substances will be performed in compliance with U.S. Department of Transportation regulations to the maximum extent that they can apply. A Reasonable Suspicion test will check for the presence of controlled substances and/ or drugs and their metabolites deemed illegal as pursuant to State statutes. Testing may be requested for other substances if there is reason to believe they are used.

Samples will be given at a collection site designated or approved by Metro Government or may be done on-site according to established procedures. If an initial screening test is positive for a controlled substance or metabolite, a second confirmatory test is performed using gas chromatography/mass spectrometry (GS/MS) analysis. If the resulting confirmatory test reveals the presence of a controlled substance and/or illegal drug metabolite at or above the defined thresholds, it will be considered a positive test. A donor who provides a specimen that tests positive is administratively defined as being under the influence of drugs for the purposes of this policy.

C. Testing Procedures

An employee or applicant will be given a written order to report to a collection site for testing. The employee will then report to the collection site immediately with proof of identification. A breath alcohol test (BAT) will be conducted at the site and/or when ordered, the employee will give a urine sample for controlled substances. The urine sample will be split in case of the possibility of retest. All test and laboratory procedures, including the chain of custody procedures, are available for review in the Department of Human Resources.

VI. Notification of Results and Role of the MRO

All controlled substances tests are reviewed and interpreted by a physician designated as the Medical Review Officer (MRO) before they are reported to the employer. If the laboratory reports a confirmed positive result to the MRO, the MRO contacts the employee or applicant to determine if there is an alternative medical explanation for the substances found in the urine specimen. If the employee provides appropriate justification and the MRO determines that it is a legitimate medical use of the prohibited substances, the result is reported as negative to the employer, although the employee may not be

medically qualified to perform normal functions. In this instance, the MRO will advise the employee that pursuant to this policy, employees are required to report to their supervisor when taking medication that could impair ability to perform.

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.

B. Removal from Normal Duties

An employee who tests positive for controlled substances or alcohol is in violation of this policy and shall be removed from performing normal duties pending further action. An employee who is ordered to test based on reasonable suspicion shall be removed from any duties in which the employee might pose a possible safety risk until such time that negative test results are confirmed.

C. Removal from Register or List

Employees and applicants who have a confirmed positive pre-appointment test result for controlled substances or alcohol or refuse to test will be denied appointment and removed from the register or list.

D. Rehabilitation and/or Disciplinary Action

Employees who test positive on any test for controlled substances or alcohol, including pre-appointment tests, shall be subject to further action, which may include rehabilitation and/or disciplinary action up to and including termination. Disciplinary action is at the discretion of the Appointing Authority. The Appointing Authority may take into account factors such as the circumstances which led to testing, the employee's work history, job performance, and past corrective or disciplinary action.

Those employees who have not gained Civil Service status who have shown a positive test result for drugs shall be entitled to an informal hearing before the Appointing Authority or his designee but shall not be entitled to any appeal rights to the Civil Service Commission.

Disciplinary action based on a violation of the Metropolitan Government's substance abuse policy is not automatically suspended by an employee's participation in an Employee Assistance Program and disciplinary action may be imposed upon the employee if the Appointing Authority find such action warranted.

IX. Return to work and Follow-up

Employees with a confirmed positive test for controlled substances or alcohol may be referred to the Employee Assistance Program for evaluation.

If allowed to return to work, the employee must complete the following requirements:

1. Sign a return-to-work agreement
2. Be recommended by the Employee Assistance Program or other appropriate counselor to return to work
3. Submit to a return-to-work test with confirmed negative results prior to return to work
4. Comply with the terms of the Return-to-Work Agreement

Failure to comply with the Return-to-Work Agreement will subject an employee to disciplinary action.

ANALYSIS AND CONCLUSIONS OF LAW

1. Pursuant to Tenn. Comp. R. & Regs. 1360-04-01-.02, Metro bears the burden of proof in this matter to show that the Grievant has violated Metro's written rules, policies or procedures, and the discipline imposed was the appropriate discipline for any violation of such rules / policy.

2. The Metro Civil Service Rules, Section 6.7, subsection 11, state that the violation of any written rules, policies or procedures of the department in which the employee is employed can be grounds for disciplinary action.

3. Metro Policy provides that the willful refusal to submit to an alcohol or drug screening test will be treated the same as a positive test. Willful refusal includes the failure to provide an adequate sample for testing, absent a medical basis.

4. The Grievant failed to provide a urine sample that was sufficient for testing after ample opportunity to do so. The MRO determined that there was no medical reason for this failure, which was appropriately deemed a positive test.

5. According to Metro Policy, a positive test will subject the employee to disciplinary action, up to and including termination of employment, at the discretion of the appointing authority. Extenuating circumstances and work history *may* be considered for this purpose.

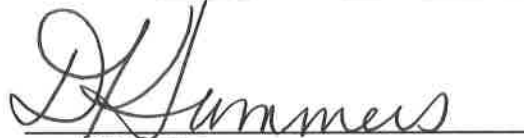
6. The Grievant was given two opportunities to provide additional evidence to be considered by the Appointing Authority for making a decision on the appropriate disciplinary action. Notwithstanding this additional information, the Appointing Authority determined that the Grievant's actions warranted termination. This decision was consistent with governing policies and rules as well as Metro's normal practice pertaining to positive drug tests.

It is determined that the termination of Grievant's employment was consistent with Metro rules, guidelines, and prior practice and procedure and, therefore, should be **UPHELD**.

The policy reason for this decision is to protect the citizens and employees of Nashville and Davidson County and protect the integrity of the civil service laws and applicable rules.

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the 30th day of JUNE 2015.



KIM SUMMERS
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the 30th day of JUNE 2015.



J. RICHARD COLLIER, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

APPENDIX B TO INITIAL ORDER

NOTICE OF REVIEW PROCEDURES

Review of Initial Order

(1) Pursuant to the provisions of T.C.A. §4-5-315, notice is hereby given that this Initial Order will be reviewed by the Civil Service Commission. Pursuant to Civil Service Commission Policy 6.8 A-1, paragraph 0, the parties may file written briefs with the Commission.

(2) A party may file a petition for reconsideration of this Initial Order, within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. See T.C.A. §4-5-317 on petitions for reconsideration.

After the disposition of the petition for reconsideration, the Initial Order will be subject to the Civil Service Commission's review as set forth in paragraph (1) above.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

Review of Final Order

Within fifteen (15) days after the entry date of a Final Order by the agency, a party may petition the agency for reconsideration of the Final Order. If no action is taken within twenty (20) days for filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in Davidson County Chancery Court within sixty (60) days of the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.