February 2016

Jerry Perigo vs. Metro Civil Service

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

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
February 4, 2016

Tara M. Ladd, Esq.
Assistant Metropolitan Attorney
Metropolitan Government of Nashville
and Davidson County
Department of Law
Metropolitan Courthouse, Suite #108
P.O. Box 196300
Nashville, Tennessee 37219-6300

Kim C. Gilleland, Esq.
745 S. Church Street
Suite 303
Murfreesboro, Tennessee 37130

RE: In the Matter of: Jerry Perigo Docket No. 43.02-129733J

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

Administrative Procedures Division
Tennessee Department of State

/srp

cc: Lou Sorrow, Metro Civil Service Commission
BEFORE THE METRO CIVIL SERVICE COMMISSION OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

IN THE MATTER OF:

JERRY PERIGO

DOCKET NO.: 43.02-129733J

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 February 19, 2016.

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:

Metropolitan Department of Water
and Sewerage Services of Nashville
and Davidson County,

Petitioner,

v.

JERRY R. PERIGO,

Grievant.

DOCKET NO: 43.02-129733J

INITIAL ORDER

This contested case hearing was heard on June 24 and July 31, 2015, in Nashville,
Tennessee, before Administrative Law Judge Michael Begley. Attorney Tara Ladd represents
Petitioner in this matter, and attorney Kim Gilleland represents Grievant.

The subject of this proceeding is Grievant’s appeal of his termination from employment
by Petitioner effective January 20, 2015, for violation of the AWOL and Substance Abuse
Policies.

After consideration of the entire record in this matter, it is determined that Grievant shall
be permitted to return to work immediately. It is also determined that Grievant did violate the
policies listed but as a first time offender only under the current policies. As such, Grievant is not
permitted to receive back pay and benefits. The period from his January 20, 2015, termination to
the date this Order becomes effective shall serve as a substantial suspension period without pay.
It is therefore ORDERED that Grievant shall be permitted to return to work without back pay only after he passes a drug and alcohol test. Grievant shall also be subject to follow-up testing as outlined by the Substance Abuse Policy. This determination is based upon the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. At the time of his termination, Grievant was employed as an Industrial Technician Master and assigned to the Metro Water Services Dry Creek Treatment Plant. His duties included the maintenance and repair of electrical and mechanical equipment at the treatment plant.

2. Due to its potential to affect public health and safety, Grievant’s position was subject to random alcohol and drug testing.

3. Regular hours for Grievant’s shift were from 6:00 am until 2:25 pm, with 8:00 am and 1:00 pm breaks and lunch at 11:00 am.

4. Grievant was disciplined in 1993 for an incident involving property damage. He was suspended for 2 days and ordered to pay restitution for property damage incurred as a result of the incident. Substance abuse was mentioned as a prior allegation in the body of the letter, but there was no supporting documentation to outline the prior incident or specify what may have occurred.

5. Grievant was placed on a 1 year return-to-work agreement in 2001 for incurring a charge of Driving Under the Influence (DUI) while off-duty. During the 1 year period, Grievant passed numerous drug and alcohol tests. He was permitted to return to work 1 year later at the completion of the agreement.

6. Grievant was disciplined in 2004, 2005, and 2006 for violations of other policies not
related to alcohol or substance abuse. He had not been formally disciplined since 2006 until his termination, and he has not failed any drug or alcohol screens during this time.

7. While Petitioner does not have any formal rule requiring 2 failed drug and alcohol tests before an employee is terminated, it is considered to be the common practice. Another practice is that prior discipline cannot enhance future discipline after a 2 year period of good behavior. Substance abuse is an exception to this rule, but an off-duty DUI is considered to be a “conduct unbecoming” violation rather than a substance abuse violation.

8. Due to suspicion by several of his co-workers, Grievant met with his direct supervisor, Ricky Hillis, and Mr. Hillis’ supervisor, Jim Elliot, on June 6, 2014. Mr. Hillis and Mr. Elliot expressed their beliefs that Grievant had an alcohol problem at this meeting. Grievant was instructed that his drinking would be reported to Brent Freeman, Metro Water Services Superintendent over the waste water treatment plants, if the issue was not corrected. No formal discipline resulted from this meeting.

9. Grievant took off of work for approximately 2 weeks shortly after the meeting with Mr. Elliot and Mr. Hillis. During this time Grievant underwent gastric bypass surgery.

10. After Grievant’s return to work, Mr. Elliot suspected Grievant had begun drinking on the job again and contacted Brent Freeman. Mr. Freeman contacted William Coleman, Substance Abuse and Safety Coordinator, and asked Mr. Coleman to investigate Grievant’s behavior.

11. During a December 2, 2014 visit to the plant, Mr. Coleman found several empty bottles of whiskey in the golf cart that had been assigned to Grievant.

12. On December 11, 2014, Mr. Hillis again suspected Grievant was intoxicated on the job
and called Mr. Coleman to come out to the plant to investigate. James Potts, a technician who worked with Grievant, also smelled alcohol on Grievant that same day.

13. Mr. Coleman arrived at the plant and spoke with Grievant around 1:30 pm on December 11, 2014, in the maintenance shop. Due to the smell of alcohol and Grievant’s mannerisms, Mr. Coleman instructed Grievant to stay in the maintenance shop while Mr. Coleman went to get Mr. Hillis to begin the process of filling out the form in order to require Grievant to submit to a reasonable suspicion drug and alcohol test.

14. Almost immediately, Mr. Coleman returned with Mr. Elliot and Mr. Hillis. Grievant could not be found, as he had left the maintenance shop.

15. Mr. Hillis located Grievant on the grounds a short time later and told Grievant that Mr. Coleman thought Grievant was drinking on the job and asked Grievant the same. During this time, Mr. Coleman went to his vehicle to obtain the reasonable suspicion form in order to fill it out and send Grievant for a test.

16. Mr. Hillis returned to the maintenance shop without Grievant. At Mr. Coleman’s direction, Mr. Hillis texted Grievant and informed him that Mr. Coleman wanted to speak with him because Mr. Coleman believed Grievant was drinking and wanted Grievant to submit to a drug and alcohol test. Telephone records indicate that Grievant was still on the premises at this time, but he did not respond. Grievant also parked his vehicle in an unsecured basement rather than the maintenance shop, where Mr. Coleman, Mr. Hillis, and Mr. Elliot were waiting.

17. Mr. Potts also spoke with Grievant outside to maintenance shop watching Mr. Coleman, Mr. Hillis, and Mr. Elliot. Grievant told Mr. Potts that the men wanted Grievant to take a drug test. Grievant would later intimate to Mr. Potts that he had to think of a way to get
out of the plant.

18. At 2:13 pm, Grievant called Mr. Elliot and told him that he had left the plant to pick up his daughter and that he was already in Lakewood, approximately 15 minutes away. However, Grievant was still at the plant at the time of the 2:13 pm phone call. Grievant also testified that he had received approval to leave early already by informing Mr. Hillis that Grievant had to pick up his daughter early for choir practice, but he stated he was leaving to pick up his daughter due to sickness later that same day.

19. Grievant left the plant at approximately 2:17 pm without submitting to a drug and alcohol test and without returning to the maintenance shop. His early departure made it impossible for Mr. Coleman to comply with the procedures regarding reasonable suspicions drug and alcohol testing.

20. As a result of his actions on December 11, 2014, Petitioner notified Grievant of his violation of civil service rules and regulations by letter on January 5, 2015. After a disciplinary hearing, Petitioner terminated Grievant by letter dated January 16, 2015, in which Grievant was terminated effective January 20, 2014.

**CONCLUSIONS OF LAW**

1. Petitioner was terminated for violation of the AWOL and Substance Abuse Policies.

2. Civil Service Rule section 4.4 states the following regarding AWOL:

   An employee who fails to report for whatever reason, unless prior approval has been given, shall be required to notify the designated supervisor in his department stating a reason for his absence. This notification must be made no later than the first hour of the employee’s scheduled work day. When notification is given the supervisor may approve the absence or may instruct the employee that he/she is being recorded as being on absence without leave. The failure of an employee to comply with this rule or having time recorded as absence without leave may be considered as grounds for disciplinary action.
3. "Absence Without Leave" is defined as an absence from duty which was not authorized or approved.

4. In addition to listing absence without notification or approval for leave as grounds for disciplinary action, Section 6.7 cites the substance abuse policy by listing drinking and/or being "under the influence of intoxicating beverages or drugs...when on duty or upon reporting to duty."

5. Section 3 (C) of Policy 6.1 outlines the procedures for reasonable suspicion testing, and section 7 (A) establishes that willful refusal to submit to a test or attempts to tamper with a test are treated as a violation of the policy by way of a positive test. Discipline under this section can include termination but is not required to do so.

6. In this case, Petitioner did not follow the policy in requiring Grievant to submit to a drug and alcohol test because Grievant attempted to subvert the process by leaving without approval. Due to the numerous contradictions in his testimony, Grievant is not a credible witness. Reinstating Grievant based on Petitioner’s failure to follow the reasonable suspicion testing policy would serve to encourage future individuals to subvert the testing process.

7. Grievant’s willful departure from the plant on December 11, 2014, amounted to a violation of both the AWOL and Substance Abuse policies. However, this would only be Grievant’s first failed drug and alcohol test. While 2 failures are not explicitly required prior to termination, testimony indicated that 2 failed tests are the common practice. Moreover, the termination letter itself states "This is your second violation of the Substance Abuse Policy during your tenure with Metro Water Services. As such, it has been determined that your employment with Metro Water Services be terminated..." The
statement confirms that the intent is for two violations to occur prior to termination. However, the termination letter is incorrect in that this is only Grievant’s first violation of the Substance Abuse Policy.

8. Grievant’s last formal discipline occurred in 2006, well before the 2 year window within which prior discipline could enhance future discipline. His off duty DUI in 2001 could only be disciplined as “conduct unbecoming”. In addition, any violations from 2001 were corrected by the completion of the return to work agreement in 2002. The only other reference to the Substance Abuse Policy in the record was in the 1993 letter in which it was merely referenced as a part of a property damage incident. There is nothing in the record indicating how or even if the Substance Abuse Policy was actually violated in 1993.

9. Grievant’s actions on December 11, 2014, violated both the AWOL and Substance Abuse Policies. His attempt to leave the premises without permission constitutes a failed drug and alcohol test. However, he shall be permitted to return to work since this is his first failed drug and alcohol test. In light of Grievant’s culpability, as well as his dishonest actions, he is not entitled to receive back pay or benefits for the time he was not employed by Metro Water Services. Grievant shall also be subject to all return to work drug and alcohol testing procedures upon his return to work, including his passing a drug and alcohol test prior to the reinstatement of his employment.
10. As such, Grievant shall be permitted to return to work without back pay after he passes a drug and alcohol test. Grievant shall also be subject to follow-up testing as outlined by the Substance Abuse Policy.

**IT IS SO ORDERED.**

It is so ORDERED, entered and effective this the 45th day of **February** 2016.

[Signature]

Michael Begley
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the 45th day of **February** 2016.

[Signature]

J. Richard Collier
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.