

IN THE MATTER OF APPEAL PROCEEDINGS
HEARING EXAMINER NORMAN BENNETT

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OFFICER BLAYNE WILLIAMS))
Appellant))
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-and-) Appeal of Indefinite Suspension
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CITY OF AUSTIN, TEXAS))
City))
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_____)

APPEARANCES:

For the Appellant: Greg Cagle
Gary Bledsoe
Attorneys of the Appellant

For the City: Ann Speigel
Assistant City Attorney

OPINION

Chief of Police, Art Acevedo, of the Austin Police Department (Department or APD) issued Police Officer Blayne Williams (Appellant) a Memorandum of Indefinite Suspension (Memorandum), dated October 2, 2013. This disciplinary action arose from an incident at the Hyatt Regency Hotel (Hyatt or Hotel), during which the Appellant was working approved off-duty employment as a Manager On-Duty Security Person. While engaged in such duties, the Assistant Front Desk Manager, Rachael Martinez (Martinez), sent the Appellant to Room 929 in reference to a report a guest had heard an alarm going off in the ceiling above the shower. While investigating the incident, the Appellant retrieved a cell phone from a tile above the shower.

The Memorandum charges the Appellant with Neglect of Duty (APD Policy 900.3.1) and the Guidelines for Incident Reporting (APD Policy

402.1.1) by the failure to write an APD incident report or call for an APD unit to respond to the scene. The Memorandum further charges the Appellant with Neglect of Duty (APD Policy 900.4.3) and the failure to follow Property and Evidence Collection Procedures (APD Policy 701.1) by the failure to seize the cell phone as evidence. The Memorandum also charges the Appellant with dishonesty (APD Policy 900.3.1) in his IA interview and Discipline Meetings by making conflicting and contradicting statements about a suspicion that a crime had taken place.

There are three ultimate issues in this case. First, did the Appellant engage in the conduct charged in the Memorandum? Second, if so, did such conduct violate the Policies and Guideline cited in the Memorandum? Third, if these questions are answered in the affirmative, is an indefinite suspension an appropriate discipline in this case? If not, what is the appropriate level of discipline to be imposed in this case?

Factual Background

On April 10, 2013, the Appellant was working an approved non-law enforcement related job at the Hyatt on Barton Springs Road in Austin. The Appellant had worked for the Hotel before his employment as a police officer with the Department. In the performance of his duties at the Hotel, the Appellant did not wear a gun, badge, or uniform. He functioned as a regular citizen and employee of the Hotel. The Appellant essentially performed such duties without taking any law enforcement action at the Hotel. The Hotel also contracts for APD officers to work in a law enforcement capacity at the Hotel. Those officers are paid significantly more per hour than officers performing non-law enforcement duties for the Hotel.

At approximately 6:30 p.m. on this evening, Martinez notified the Appellant that a guest in Room 929 had reported that she had heard a phone or an alarm going off in the ceiling of her room. The

Appellant states in his Supplemental incident report: "Rachael told me that the guest allegedly checked the restroom ceiling and located a cell phone that had been concealed in the ceiling." In his Internal Affairs (IA) interview, the Appellant stated that Martinez told him "a guest had complained to the front desk manager and that a phone or alarm was going off in the ceiling." According to the Appellant, Martinez said she "thought it was our engineering guy," who had left the phone in the ceiling.

The Appellant responded to the complaint by going to Room 929. The Appellant knocked on the door of the room and announced his presence. With no response, the Appellant entered Room 929. When checking the room, the Appellant observed a ceiling tile in the bathroom that appeared to have been moved slightly back. He also observed a small hole in that ceiling tile. The Appellant took a photo and video tape of the ceiling tile on the cell phone provided by the Hotel. The Appellant moved the tile aside and ran his hand along the metal brace on top of the tile. In that effort, the Appellant discovered a dark cellular telephone at the back right corner of the tile.

The Appellant knew that the ceiling in Hyatt bathrooms contained wiring and devices for the Hotel internet. He was also aware that it was not uncommon for engineering to work in those areas. According to the Appellant, the phone he found was the type used by engineering in the performance of their Hotel duties. The Appellant powered on the phone in an attempt to determine its owner. He had previously performed that task with hundreds of phones he had found at the Hotel. The phone came on for a few seconds and displayed the face of a small, Asian child. The screen saver indicated a 1% battery life and then phone powered down.

The Appellant took the phone to Martinez and asked her to try to locate a charger. He also expressed his concern that something improper might be on the phone. The Appellant then returned to his

other Hotel duties. On returning to the front desk, the Appellant was informed that a charger could not be located. The Appellant went back to Room 929 with Armando from maintenance. At the room, the Appellant asked Armando if engineering would make a hole like that in the tile in the performance of their duties. Armando did not know the answer, but sent an email to the staff to inquire about that matter. The Appellant testified that he filed an initial internal report and also a written statement regarding the incident with the Hotel.

Willie Smith, a security staff employee, was working a different shift than the Appellant. Smith testified he never went to the room wherein the incident occurred. He further testified that he completed the internal report initially filed by the Appellant. Security was able to retrieve information from the phone that led them to believe that a Hotel employee was improperly attempting to record Hotel guests. The APD was immediately contacted about the incident. The Appellant did not write an APD incident report concerning the incident. He also did not call for APD units to respond to the scene to take a report regarding the incident. Hyatt terminated the employment of the Hotel employee suspected of improperly videotaping guests. Criminal charges were also filed against the employee suspected of videotaping.

APD Corporal Terrell Johnson was dispatched to the call at the Hyatt the day after Appellant found the phone. Corp. Johnson looked for an APD incident report regarding the incident, but he could not locate one. Later that day, the Appellant's supervisor instructed the Appellant to write a Supplemental report regarding the incident. The Appellant complied with that order and prepared a Supplemental incident report. He then submitted that Supplemental report to the Department.

On April 17, 2013, Commander Fred Fletcher signed an Internal Affairs Complaint regarding the incident. The Complaint states: "Officer Williams found a device that may have been involved in the

commission of a crime. Officer Williams might have made a comment to the hotel staff stating they may have a criminal offense and may want to contact the police department." Commander Fletcher then began conducting an investigation into the incident by interviewing Hyatt employees regarding the incident.

On May 3, 2013, the Appellant was notified of the Internal Affairs Complaint. Internal Affairs conducted an investigation that included interviews with the Appellant, Corp. Johnson, and Det. Pete Bonilla. Det. Bonilla was holder of the contract for APD employee at the Hotel. Internal Affairs, however, did not interview any of the Hotel employees. Hotel employees stated that they just wanted to file a report, but that they didn't want to have further involvement in any investigation. In his IA interview, the Appellant stated he told Martinez that the phone found in the ceiling could potentially contain improper video or improper photography that could constitute a criminal offense.

On September 3, 2013, the Appellant was notified in writing that the investigation regarding this conduct at the Hyatt had been concluded. The Appellant was further notified that two policy violations had been sustained. Those violations were Incident Reporting and Documentation and Proper and Evidence Collection Procedures. The notification also advised the Appellant that the disciplinary recommendation from his Chain of Command was a "Written Reprimand to 3 days." Commander Fletcher was a part of the Chain of Command that made that recommendation.

On September 20, 2013, a second Notice of Sustained Allegations was issued to the Appellant. This second Notice was issued without any additional complaint, notice of additional factual allegations, or notice of additional policy violations. It was also issued without any additional investigation by Internal Affairs. This Notice, however, did allege two additional policy violations, Neglect of Duty and Honesty. This second Notice further advised the Appellant that

prior range of discipline, which had been up to a three-day suspension, was now up to an indefinite suspension. Finally, this Notice alleges that the Appellant made "false, conflicting and/contradictory statements" during the IA and at both Disciplinary Hearings.

Discussion

The Honesty Allegation

The Memorandum alleges that the Appellant was dishonest by the contradicting and conflicting statements in his Internal Affairs interview and in his Discipline Meetings. The Appellant made the following statements in the IA interview:

Never was able to charge the phone. I took the phone back to the security department. Uh, I wrote up an internal incident report on it, and I left a note for the director of security explaining to him what un, what I had done as far as trying to charge the phone up, and I told him, I said, "Hey, listen. If you get the phone charged up, find out what's on the phone. If there's anything, you can give me a callback. Um, I said improper video, improper photography. If engineering's doing that, find that employee, fire 'em, and prosecute 'em, and that's that."

. . .

I never told 'em that they needed to call APD. I said, "Find out what's on the phone. Find out if the engineering guy left the phone there, and once you verify that, then improper video/improper photography is a serious incident. It could be potentially a felony." And I would say it was not less than 40 minutes that had expired from that time between me finding other chargers a couple of time and then going back up to the room with (Armando}.

The Appellant stated in his first Disciplinary Review Hearing (DRH) that he was thinking there "might be something suspicious" about the phone and he wanted to charge it up. The transcript reflects that the Appellant explained that "his thought was to get the charger to

see if there was anything incriminating on the phone." The Appellant further said, "Initially, when I found the phone - my concern was that the Engineer had left the phone up in the ceilin' like the manager identified." Further, "I didn't have anything that led me to believe there was anything criminal or nothing because I didn't go in the phone." The Appellant also stated that he didn't find anything suspicious about the tile or the hole that was in it.

The Appellant stated in his second DRH that he suspected a possible violation. According to the transcript, he explained: "I didn't have any information that would have led me to believe that a criminal offense had actually been committed. So my suspicion there was there but it was just mere suspicion, it wasn't nothing ground in reason." The Appellant further explained that finding the cell phone above the shower could "potentially" be suspicious, but it wasn't in this case because the manager "identified an employee that worked for the hotel that put it there."

The Appellant also conceded in the second DHR that a cell phone over a ceiling tile in a bathroom occupied by a woman involved a potential criminal issue. According to the transcript, he also acknowledged that it was his responsibility, not the responsibility of the employees of the Hotel, to determine whether something criminal was on the phone. The Appellant also stated in this DHR interview that he would do the same thing again if confronted with a same or similar situation.

The Memorandum does not identify which statements are alleged to be contradictory and conflicting.¹ Sgt. Oliver Tate, the only IA investigator assigned to the case, testified he "didn't know" the

¹ Section 143.052(e) of the Code states: "The written statement filed by the department head with the commission must point out each civil service rule alleged to have been violated and **must describe the alleged actions** of the person that the department head contends or in violation of the civil service rules. **It is not sufficient for the department head merely to refer to the provisions of the rules alleged to have been violated.**"

statement(s) attributed to the Appellant that caused him to be charged with the honesty violation. He also testified that he was unaware of the factual basis for the untruthfulness allegation and did not know who added them to the charges. Chief Acevedo was asked at the hearing to identify the false statement(s) attributed to the Appellant since they were not alleged in the charging instrument. Chief Acevedo responded: "I **believe** he was dishonest, **our opinion**, he was dishonest about his motivation for the failure to act as a police officer."²

The Memorandum apparently alleges that the Appellant was dishonest about his level of suspicion upon finding the phone compared with his level of suspicion after the discovery that the phone contained improper material. The Appellant readily conceded during the interviews and the hearings that he had enough "suspicion" to ask that the phone be checked for improper recordings. After learning that the phone contained improper videotaping, the Appellant had a different level of suspicion. At that point, he had reasonable cause to believe that a crime had been committed.

It appears that the dishonesty allegation in the Memorandum charges that the Appellant lied about his stated level of suspicion when he first found the phone. Put another way, the Appellant lied about his state of mind when he first found the phone. On this point, the issue under the honesty allegation is not whether the Appellant should have had a different state of mind. That issue will be addressed in the following section, the Neglect of Duty section, of this award.

Chief Acevedo candidly acknowledged at the hearing that the honesty charge is based on "belief" and "opinion" garnered from

² Bold lettering within quotes in this opinion means that emphasis has been added.

statements during the interviews evaluated to be conflicting. Commander Fletcher also believed a finding of honesty misconduct in that case would be based on "opinion." It is this view that the evidence is not sufficient to establish that the Appellant lied about his level of suspicion when he first found the phone. Accordingly, the honesty charge in the Memorandum cannot be found to be true and, therefore, is not sustained.

**The Neglect of Duty, Incident Reporting and Documentation
and Evidence Collection Procedures Allegations**

Policy 900.4.3 defines Neglect of Duty as any failure to take "appropriate action" on the occasion of any **other condition deserving police attention.**" The Appellant contends that such requirement under the Policy would impose a duty on him not required under state law. Under that approach, the Appellant could delegate the investigation of a suspicious condition deserving police attention to a third party instead of reporting it. How the requirement to take "appropriate action" on a "condition deserving police attention" would violate state law is not apparent.

The Appellant had enough suspicion that a felony may have been committed to delegate the investigation of that matter to the Hotel. That suspicion should have been enough to require "appropriate action" on a matter "deserving police attention." Specifically, the Appellant should have notified or called the APD to report the incident. Any such notification would have afforded the APD the opportunity to document the incident as required under APD Policy 402.1.1 and the opportunity to collect evidence as required under Policy 701.1.

The evidence convinces that the Appellant engaged in the misconduct of Neglect of Duty by his failure to notify or call the APD to report his suspicion that a felony may have been committed. That Neglect of Duty resulted in denial of the opportunity for the APD to document the incident and the opportunity to collect evidence. These

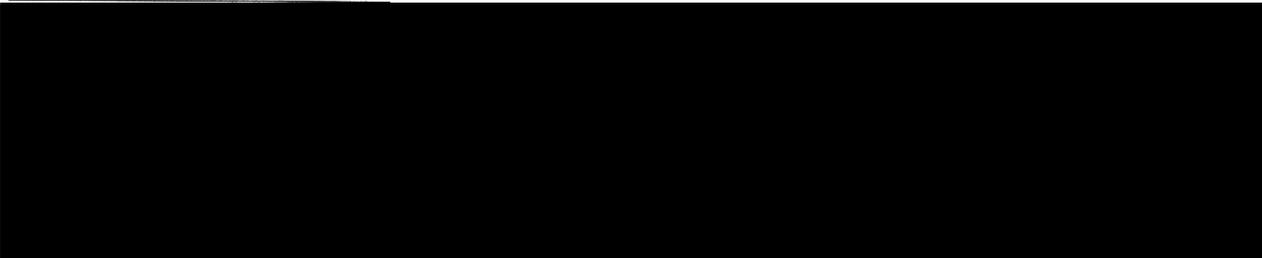
Policy allegations as set forth in the Notice are determined to be true and, therefore, sustained.

The Appropriate Discipline

The Chain of Command determined that "up to a 3-day (suspension)" was the appropriate discipline for the allegations sustained in this case. The Memorandum, however, cites a 90-Day Agreed Suspension (Suspension), dated September 15, 2011. The Suspension resulted from a charge that the Appellant [REDACTED] The Agreed Suspension placed the Appellant on a two-year probationary period. It also contained an agreement by the Appellant that he would be indefinitely suspended if he engaged in same or similar acts of misconduct. It is apparent that the misconduct in the [REDACTED] case is not "same or similar" to the misconduct in the present case for which the Chain of Command recommended a discipline of up to a 3-day suspension.

There is no doubt that the Chief can properly consider the Agreed Suspension on the issue of the appropriate discipline in this case. See *Vick v. City of Waco*, 614 S.W.2d 861, 863 (Tex. Civ. App.--Waco 1981, writ ref'd n.r.e) and *City of Houston v. Dillon*, 585 S.W.2d 212, 213 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e., (holding that acts and events outside the six month period may be used to explain and evaluate the propriety and gravity of acts within the six month period.)

A hearing examiner only has the authority to reduce an indefinite suspension to a temporary suspension of 15 days or less. See *Waco v.*



Kelly, 309 S.W.3d 536, 542 (Tex. 2010). Considering the cited prior discipline, this is a case wherein the appropriate discipline does not rise to the level of an indefinite suspension but clearly arises above a suspension of more than 15 days. Nevertheless, a hearing examiner's view of an appropriate discipline is constrained by the holding in the Waco case. Therefore, the appropriate discipline in this case is determined to be a 15-day suspension.

AWARD

The appeal is granted, in part, and denied, in part. The Indefinite Suspension is reduced to a 15-Day Suspension. Back pay is awarded in according with this reduction. Jurisdiction is retained in the event there a dispute arises as to this remedy.

DATED, this the 31st day of October, 2014.



Norman Bennett
ARBITRATOR