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MEMORANDUM

Austin Police Department *Office of the Chief of Police*

TO: Mark Washington, Director of Civil Service

FROM: Art Acevedo, Chief of Police

DATE: January 12, 2012

SUBJECT: Temporary Suspension of Police Officer Kevin Kelly # 4877
Internal Affairs Control Number 2011-0948

Pursuant to the provisions of Chapter 143 of the Texas Local Government Code, Section 143.052, and Rule 10, Rules of Procedure for the Firefighter's and Police Officer's Civil Service Commission, I have temporarily suspended Police Officer Kevin Kelly #4877 from duty as a police officer of the City of Austin, Texas, for a period of three (3) days. The temporary suspension is effective beginning on January 13, 2012 and continuing through January 15, 2012.

I took this action because Officer Kelly violated Civil Service Commission Rule 10.03, which sets forth the grounds for disciplinary suspensions of employees in the classified service, and states:

No employee of the classified service of the City of Austin shall engage in, or be involved in, any of the following acts or conduct, and the same shall constitute cause for suspension of an employee from the classified service of the City:

- L. Violation of any of the rules and regulations of the Fire Department or Police Department or of special orders, as applicable.

The following are the specific acts committed by Officer Kelly in violation of Rule 10:

On August 3, 2011, at approximately 2:53 p.m., Officer Kelly was dispatched to 919 East 32nd Street on a disturbance call for an intoxicated person brought to St. David's Hospital by EMS. The intoxicated person had been arrested by UT police for public urination but released to EMS without filing charges because he passed out while in UT police custody. At the hospital, the person became uncooperative with staff allegedly spitting, cursing and trying to damage the ER examination room. Once medically cleared, the St. David staff called 911 to have an officer dispatched to remove the intoxicated person from the hospital.

Officer Kelly arrived at the call at 3:01 p.m. but did not activate his mobile video recorder (MVR) until 3:09 p.m. When Officer Kelly first contacted the intoxicated person, he was asleep in the ER examination room. The person had to be dressed by hospital staff and could not stand or walk without assistance. According to Officer Kelly, the man's breath smelled strongly of alcohol, he had red bloodshot and watery eyes and he could not stand or walk. Officer Kelly placed the man under arrest for public intoxication. Officer Kelly listed the arrested suspect's occupation as "alcoholic" in his Versadex offense report. Officer Kelly also acted unprofessionally by engaging in argumentative discussions with the arrested suspect in which Officer Kelly made several inappropriate comments.

By these actions, Officer Kelly violated Rule 10.03(L) of the Civil Service Rules by violating the following rules and regulations of the Austin Police Department:

➤ **Austin Police Department General Orders Policies and Procedures
A306b.01(B and E): Mobile Video Recorder Operation**

**.01 Operation of Police Vehicles Equipped with Mobile Video/Audio
Recording Equipment**

- B. Officers driving MVR-equipped vehicles during field duty assignments where the required use of the MVR is likely (e.g., patrol, metro-tactical shifts, traffic enforcement) will test the equipment by making a MVR recording while giving their name, date, and time. Officers will review the recording to verify the in-car and body microphone was operational during the test. Officers will test the MVR, ensuring the date and time is accurate:
 - 1. At the commencement of their tour of duty.
- E. Officers driving MVR equipped vehicles will activate the MVR equipment when the officer has detained or arrested a person, is attempting to arrest or detain a person, or by nature

of the call for service the officer is likely to detain or arrest a person. This requirement applies to the primary unit as well as any additional unit(s) responding to the scene to assist the primary officer.

➤ **Austin Police Department General Orders Policies and Procedures
A201b.01: Responsibility to the Community: Impartial Attitude**

.01 Impartial Attitude

- A. Employees are expected to act professionally, treat all persons fairly and equally, and perform all duties impartially, objectively, and equitably without regard to personal feelings, animosities, friendships, financial status, sex, creed, color, race, religion, age, political beliefs, sexual preference, or social or ethnic background.
- a. Employees will respect the rights of individuals and will not engage in discrimination, oppression, or favoritism whether by language, act, or omission.
 - b. The use of racial or ethnic remarks, slurs, epithets, words or gestures, which are derogatory or inflammatory in nature to or about any person or group of persons, is strictly prohibited.
 - c. In performing their duties, employees shall not express or otherwise manifest any prejudice concerning race, religion, national origin, age, political affiliation, sex, life style, or other personal characteristics.
- B. Employees shall be tactful in the performance of their duties, shall control their tempers, exercise patience and discretion and shall not engage in argumentative discussions even in the face of extreme provocation.

By copy of this memo, Officer Kelly is hereby advised of this temporary suspension and that the suspension may be appealed to the Civil Service Commission by filing with the Director of Civil Service, within ten (10) days after receipt of a copy of this memo, a proper notice of appeal in accordance with Section 143.010 of the Texas Local Government Code.

By copy of this memo and as required by Section 143.057 of the Texas Local Government Code, Officer Kelly is hereby advised that such section and the Agreement Between the City of Austin and the Austin Police Association provide for an appeal to an independent third party hearing examiner, in accordance with the provisions of such Agreement. If appeal is made to a hearing examiner, all rights of appeal to a District Court are waived, except as provided by Subsection (j) of Section 143.057 of the Texas Local Government Code. That section states that the State District Court may hear appeals of an award of a hearing examiner only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion or other unlawful means. In order to appeal to a hearing examiner, the original notice of appeal submitted to the Director of Civil Service must state that appeal is made to a hearing examiner.

In addition, if this disciplinary suspension is for three (3) days or less, Officer Kelly is advised of the following provisions of Article 18, Section 1, of the Meet and Confer Agreement:

The parties agree that when an officer is suspended for 1, 2, or 3 days the officer may choose one of two methods of dealing with the suspensions as listed below.

- a) **Suspensions that may not be appealed.** *The officer may choose to use vacation or holiday time to serve the suspension with no loss of paid salary and no break in service for purposes of seniority, retirement, promotion, or any other purpose. The officer must agree that there is no right to appeal if this method of suspension is chosen.*
- b) **Suspensions that may be appealed.** *The officer may appeal the suspension to arbitration or the Civil Service Commission. If the officer chooses to appeal the suspension, the arbitrator or Civil Service Commission's authority is limited to ruling on whether or not the charges against the officer are true or not true. If the arbitrator or Civil Service Commission finds the charges to be true, there is no authority to mitigate the punishment. If the arbitrator or Civil Service Commission finds the charges to be not true, the officer shall be fully reinstated with no loss of pay or benefit.*

Arbitration Costs on Appealable Suspensions

In the event that an officer appeals a 1, 2 or 3 day suspension to arbitration, it is agreed that the party that loses the arbitration shall be responsible for all costs of the arbitrator, including travel and lodging if necessary.

To facilitate such payment on the part of the officer he shall submit, at the time of appeal, a signed payroll deduction agreement that if the arbitrator rules in favor of the City he authorizes up to one hundred dollars (\$100.00) per month to be deducted

from his regular pay until such time as what would usually be the City's portion of the arbitrator's costs have been satisfied.

Art Acevedo #1132 for Chief Art Acevedo
Art Acevedo
Chief of Police

1/12/12
Date

TO WHOM IT MAY CONCERN:

I hereby acknowledge receipt of the above and foregoing memorandum of temporary suspension and I have been advised that if I desire to appeal that I have ten (10) days from the date of this receipt to file written notice of appeal with the Director of Civil Service in accordance with the provisions of Chapter 143 of the Texas Local Government Code. I also acknowledge the options set forth in this memorandum of temporary suspension, including my right to waive an appeal of a suspension of three (3) days or less, and my financial and contractual obligations under the Meet and Confer Agreement if I elect to appeal a suspension of three (3) days or less and do not prevail.

Kevin Kelly #4877
Police Officer Kevin Kelly #4877

1/12/12
Date