



3-21-2012

METRO NASHVILLE GOVERNMENT (Metro
Nashville Police Department), Petitioner/
Department vs. JONATHAN SMITH,
Respondent/Grievant

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**BEFORE THE CIVIL SERVICE COMMISSION OF THE METROPOLITAN
GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, TENNESSEE**

IN THE MATTER OF:]	
]	
METRO NASHVILLE GOVERNMENT]	
(Metro Nashville Police Department),]	
<i>Petitioner/Department</i>]	
v.]	DOCKET # 43.02-111422J
]	
JONATHAN SMITH,]	
<i>Respondent/Grievant.</i>]	

INITIAL ORDER

This contested administrative case was heard in Nashville, Tennessee, on March 21, 2012, before J. Randall LaFevor, Administrative Judge, assigned by the Secretary of State and sitting for the Civil Service Commission of the Metropolitan Government of Nashville and Davidson County, Tennessee. Ms. Jennifer Cavanaugh, Assistant Metropolitan Attorney, represented the Department. The Grievant was represented by his legal counsel, Mr. John M.L. Brown. Upon the conclusion of the hearing, the matter was taken under advisement, and, pursuant to a Post-Hearing Scheduling Order, the parties filed their Proposed Findings of Fact and Conclusions of Law on May 17, 2012.

This hearing was convened at the request of Jonathan Smith (“Smith” or “Grievant”), challenging the termination of his employment with the Metropolitan Nashville Police Department (“the Department” or “MNPd”) for violations of (1) Policies, Procedures and General Orders of the Metropolitan Nashville Police Department, and (2) Rules/Regulations of the Metropolitan Civil Service Commission. Upon consideration of all the pleadings, evidence, arguments of counsel, and the entire record in this matter, it is determined that the Grievant violated the Policies, Procedures, General Orders and Rules, as charged, and that such violations warrant the termination of his employment. This determination is based on the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. At the time of the events leading up to the termination of his employment, Mr. Smith was employed as a sworn police officer at MNPD.
2. On November 7, 2010, Officers Bradley Nave and Eric Hall responded to a call at Riverchase Apartments involving a disturbance. Officer Bradley Nave was a Field Training Officer (“FTO”) at the time, and Officer Eric Hall was his trainee. As a result of their investigation, the officers arrested Yolanda Mitchell (“Mitchell”), handcuffed her, and transported her to the Criminal Justice Center.
3. Although she was obviously intoxicated, the officers described Mitchell as being very cooperative, almost friendly on the way to booking.
4. Upon their arrival at the “transfer room,” adjoining the booking room at the Criminal Justice Center, Officer Hall took Mitchell, who was still handcuffed (with her hands behind her back), inside to complete the arrest paperwork. Officer Nave waited outside the transfer room, in the doorway.
5. While Officer Hall was finishing up Mitchell’s arrest paperwork, Officer Jonathan Smith arrived with another arrestee. Smith was also on duty as a sworn police officer at the time.
6. After dropping off his arrestee, and as he was leaving the transfer room, Smith gave Mitchell a “little nudge” and pushed her about a foot to the side, to move her out of his way.
7. After Smith left the transfer room, one of the Davidson County Sheriff’s Office employees noticed that Smith had forgotten to complete his arrest report. The Sheriff’s Office employee asked Officer Nave to “holler at Mr. Smith to come on back.” Officer Nave got Smith’s attention, and Smith returned to the transfer room.
8. When Mr. Smith re-entered the transfer room, Ms. Mitchell moved to the side as she saw him walk in, and then moved back. She was speaking loudly towards Officer Nave, trying to convince him that she shouldn’t be charged with aggravated assault.

9. After Smith completed his arrest report, he started to walk through the transfer room when Mitchell said to him, "You don't need to be putting your hands on me." Smith responded, "I wouldn't put my hands on you if you'd move when I asked. If you don't want me putting my hands on you would you please move now so I can please leave the room."

10. Smith then brought his hands up and aggressively shoved Mitchell, who was still handcuffed at the time. Mitchell fell, and according to Officer Nave, "her feet came off the floor and she just kind of fell over like a tree. Just straight as a board."

11. Because she was handcuffed behind her back, Mitchell was unable to catch her balance. Her head hit the wall near the floor. Officer Nave observed that blood was flowing from Mitchell's head "pretty freely." Officer Hall testified that "blood was everywhere."

12. After Mitchell hit the floor, Smith left the room. In response to the commotion, he came back in. When he saw Mitchell on the floor and her bloody condition, he said that he "needed to call his Sergeant." Without rendering aid, he left to make the phone call.

13. Both Officer Nave and Officer Hall rushed to help Mitchell and get the attention of Sheriff's Office employees. Officer Hall sat Mitchell up, Officer Nave called for an ambulance, and they waited for a nurse to arrive.

14. Mitchell was later transported to Metro General Hospital, where she was treated for her injuries. Among other treatment, she received approximately 15 sutures to close the laceration to her forehead. Testimony indicated that she still had a scar on her forehead over a year after the incident.

15. Officer Nave and Officer Hall testified that Smith's actions of aggressively shoving Ms. Mitchell, while she was handcuffed, "completely shocked" and surprised them. They both testified that Mitchell's behavior prior to the shove was not out of control or unusual, and that they did not perceive that she posed any threat to the officers around her.

16. Officers who observed the incident testified that Mitchell was not blocking the entrance or exit to the booking room, never advanced toward Smith, and never spit at him. She was handcuffed the entire time, and obviously possessed no weapons.

17. Smith never asked for assistance in dealing with Mitchell. Since she was Hall's and Nave's arrestee, they were both available to control her or move her if such assistance was warranted or requested.

18. Sergeant Bob Allen, who teaches "use of force" tactics at the Metro Nashville Police Training Academy, was qualified to testify at the hearing as an expert in "use of force tactics." Sergeant Allen testified that every officer at MNPDP receives over 120 hours of initial training in arrest and control tactics, and receives an additional 40 hours of annual in-service training. He described and demonstrated several methods of less-aggressive tactics that are taught to recruits and officers, any of which would have been acceptable for use under the circumstances of this case. Sergeant Allen testified that Smith's action of shoving Mitchell while she was handcuffed was not an appropriate use of force.

19. As a result of the encounter with Ms. Mitchell, MNPDP charged Officer Smith with three violations of MNPDP policies. On February 10, 2011, Officer Smith had a hearing before a disciplinary board and a Deputy Chief of Police. Following that hearing, the Deputy Chief issued a Disciplinary Action letter in which he imposed a six (6) day suspension, and terminated Smith's employment with the Metro Nashville Police Department.

20. Smith timely appealed his termination from the Metropolitan Nashville Police Department, seeking reinstatement to his position as a police officer with full back pay and benefits. (He did not appeal the suspension. See Grievant's Appeal to Civil Service Commission.)

21. Subsequent to his termination, and as a result of the encounter with Mitchell, Smith was indicted for Aggravated Assault, a violation of Tennessee Code Annotated 39-13-102. On November 17, 2011, Smith entered a *Nolo Contendere* plea¹ to the felony charge of Aggravated Assault and received two years of probation.

¹ Evidence of the Grievant's *Nolo Contendere* plea was not admitted to prove that he was guilty of the charge of Aggravated Assault, but rather to establish that, should he prevail in his appeal, he was rendered ineligible to resume his former position as a police officer, in light of the prohibition contained in TCA 38-8-106(4).

22. Ms. Mitchell filed a lawsuit against the Metropolitan Government and Officer Jonathan Smith (and others) alleging that Smith injured her in the course of his employment. The Metropolitan Government settled that claim for \$30,000.

CONCLUSIONS OF LAW

1. In disciplinary appeals presented to the Civil Service Commission, the Appointing Authority is assigned the burden of proof. In this case, the Appointing Authority is the Metro Nashville Police Department. [*Disciplinary and Grievance Appeal Proceedings* (Revised 10/11/11); Civil Services Policies, # 6.8 A-I, Section M: Burden of Proof.] The burden of proof is the duty imposed upon a party to establish, by a preponderance of the evidence, that an allegation is true, or that an issue should be resolved in favor of that party. A “preponderance of the evidence” means the “greater weight of the evidence,” or “the more probable conclusion, based on the evidence presented.” Rule 1360-4-1-.02(7), TENN. COMP. R. & REGS.

2. The issues presented for consideration in this case are: (1) whether the Department has proven, by a preponderance of the evidence, that the Grievant engaged in conduct that violated the Policies, Procedures and/or General Orders of the Metro Nashville Police Department and the Metropolitan Government, as charged; and, (2) if so, whether the sanction imposed by the Department was appropriate. With respect to both issues, the Department has met its burden of proof.

3. The Department’s *Charges and Specifications* allege that the Grievant violated certain General Orders of the Metropolitan Nashville Police Department, including:

- MNPD General Order 09-03, Department and Personal Appearance; Section VII, B [Adherence to Law].
- MNPD General Order 08-06, Use of Force, Parameters for Non-Deadly Force: Section V, D [Use of force on handcuffed subjects prohibited] & Section V, E [Use of only reasonable and necessary force].

- MNPDP General Order 09-03, Department and Personal Appearance; Section VII, C [Conduct Unbecoming an Employee of the Department].

4. The Department's *Charges and Specifications* also allege that the Grievant's actions were in violation of the *Metropolitan Civil Service Commission Rules*, Chapter 6, Section 6.7 - Subsections 11 & 33: Such conduct, if proven, provides a basis for sanctions pursuant to the *Metropolitan Civil Service Commission Rules*. The cited Civil Service Rules provide as follows:

6.7 GROUNDS FOR DISCIPLINARY ACTION

The following constitute grounds for disciplinary action:

* * *

11. Violation of any written rules, policies, or procedures of the department in which the employee is employed.

* * *

33. Conduct unbecoming an employee of the Metropolitan Government.

5a. **Re: MNPDP General Order 09-03, Department and Personal Appearance, VII. Personal Behavior: B. Adherence to Law.**

MNPDP General Order 09-03, Department and Personal Appearance; Section VII, Personal Behavior, Section B: Adherence to Law, states:

1. Employees are prohibited from violating any law or ordinance.

The Department alleged that Officer Smith violated General Order 09-03 on November 7, 2010, by committing an Aggravated Assault on Ms. Mitchell, when he shoved Mitchell, who was restrained with her hands cuffed behind her back, causing her to lose her balance and fall head-first into the wall and floor of the booking transfer room. As result of that fall, she sustained a wound to her head that required multiple stitches, and resulted in obvious disfigurement to her face. At the time of the assault, Mitchell was in the custody of two other Metro Police officers. And, prior to Smith shoving her, although she was loud and obnoxious, Mitchell presented no physical threat to Smith.

5b. "Aggravated Assault" is defined in Tennessee Code Annotated § 39-13-102, which provides:

- (a)(1) A person commits aggravated assault who:
 - (A) Intentionally or knowingly commits an assault as defined in § 39-13-101,² and:
 - (i) Causes serious bodily injury to another;
 - (ii) Uses or displays a deadly weapon; or
 - (iii) Attempts or intends to cause bodily injury to another by strangulation; or
 - (B) Recklessly commits an assault as defined in § 39-13-101(a)(1), and:
 - (i) Causes serious bodily injury to another; or
 - (ii) Uses or displays a deadly weapon.

* * *

(e)(1) Aggravated assault under subdivision (a)(1)(A) or subsection (b) or (c) is a Class C felony. Aggravated assault under subdivision (a)(1)(B) is a Class D felony.

It is concluded that Smith’s actions on November 7, 2010 violated T.C.A. 39-13-102, Aggravated Assault as defined in T.C.A. § 39-13-102 (a)(1)(B)(i) [a Class-D felony]. At the very least, his actions constituted a “reckless assault resulting in serious bodily injury”³ to Mitchell, a citizen who had already been arrested, was in the custody of other officers, and was restrained by handcuffs behind her back. By shoving her into the wall while she was unable to defend herself or catch her balance, Smith caused profuse bleeding and a significant laceration to Mitchell’s forehead, which required multiple stitches and left a permanent scar, still visible more than a year later. By violating the state statute prohibiting Aggravated Assault, Mr. Smith violated MNPD General Order 09-03, “Department and Personal Appearance” VII. Personal Behavior, B. Adherence to Law.

6. **Re: Violation of MNPD General Order 08-06, Use of Force, V. Parameters for Non-Deadly Force: Sections D and E.**

MNPD General Order 08-06, Use of Force, Parameters for Non-Deadly Force; Sections D and E state:

² 39-13-101. Assault. – (a) A person commits assault who: (1) Intentionally, knowingly or recklessly causes bodily injury to another; (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

³ “Serious bodily injury” includes bodily injury that involves “extreme physical pain” or “obvious disfigurement.” TENN. CODE ANN. § 39-11-106(a)(34).

D. **Any use of force on subjects who are handcuffed or otherwise in custody is prohibited** unless physical resistance must be overcome. Such uses of force must be specifically articulated-with an emphasis on why a particular level of force used was necessary to obtain compliance. [Emphasis added.]

E. Authorized employees are permitted to use only that force which is reasonable and necessary under particular circumstances to protect themselves or others from bodily injury and only after other reasonable alternatives have been exhausted or it is determined that such alternative action(s) would be ineffective under the circumstances.

Mr. Smith's actions on November 7, 2010 violated MNPD General Order 08-06, Use of Force, Section V, Parameters for Non-Deadly Force: Sections D and E. First, the General Order prohibits "Any use of force on subjects who are handcuffed," unless physical resistance must be overcome. In this case, Mitchell was handcuffed behind her back, and in the custody of two other officers. She did not present a threat to Smith, and no other justification existed for his use of force. His use of force under those circumstances is a clear violation of Section D of MNPD General Order 08-06, Use of Force, Section V, Parameters for Non-Deadly Force. And, second, as testified by Sergeant Bob Allen, training officer at the Metro Police Academy, all officers are taught various methods of less-aggressive physical-restraint tactics, any of which would have been acceptable under the circumstances of this case. It was Sergeant Allen's expert opinion that Smith's action of shoving Mitchell while she was handcuffed was not an appropriate use of force. That opinion is found to be persuasive, and supports the conclusion that Smith used more force than was "reasonable and necessary under [the facts of this case] to protect [himself] or others from bodily injury and only after other reasonable alternatives have been exhausted or it is determined that such alternative action(s) would be ineffective under the circumstances." Mr. Smith's actions are found to be in violation of both Sections D and E of MNPD General Order 08-06, Use of Force, Section V, Parameters for Non-Deadly Force.

7. **Re: MNPD General Order 09-03, Department and Personal Appearance, VII. Personal Behavior: C. Conduct Unbecoming an Employee of the Department.**

MNPD General Order 09-03, Department and Personal Appearance; Section VII, Personal Behavior: Section C: Conduct Unbecoming an Employee of the Department provides:

C. Conduct Unbecoming an Employee of the Department

1. The conduct of department employees, on- or off-duty, may reflect directly or indirectly upon the Department, therefore, a police department employee's ability to perform his or her duties is dependent upon the respect and confidence communities have for the representatives of the law enforcement agency in general.
2. A police officer is the most conspicuous representative of government, and to the majority of the people, the officer is a symbol of stability and authority upon whom they can rely. An officer's conduct is closely scrutinized, and when the officer's actions are found to be excessive, unwarranted, or unjustified, they are criticized far more severely than comparable conduct of persons in other walks of life.
3. Employees shall at all times conduct themselves in a manner which does not bring discredit to themselves, the Department or the City. Conduct that is inconsistent with the provisions within this policy shall be considered a violation.

Mr. Smith's actions on November 7, 2010 did not represent the values of MNPDP or the Metropolitan Government of Nashville and Davidson County. A police officer's ability to perform his or her duties is dependent upon the respect and confidence that citizens have for the representatives of the law enforcement agency. "When an officer's actions are found to be excessive, unwarranted, or unjustified, they are criticized far more severely than comparable conduct of persons in other walks of life." Mr. Smith's conduct throughout this incident discredited him, the Police Department, and the City of Nashville. Further, Mr. Smith's actions undermined the respect and confidence of the community which he serves. By acting outside the constraints of the high standards set for Metro Police officers, Mr. Smith violated MNPDP General Order 09-03, Department and Personal Appearance, VII. Personal Behavior: C. Conduct Unbecoming an Employee of the Department.

8. **Re: Metropolitan Civil Service Rules Section 6.7.**

The relevant provisions of the Metropolitan Civil Service Rules; Section 6.7, state the following as grounds for disciplinary action:

11. Violation of any written rules, policies, or procedures of the department in which the employee is employed.

* * *

33. Conduct unbecoming an employee of the Metropolitan Government.

By violating the provisions of MNP General Orders, as outlined above, Smith violated the “written rules, policies, or procedures of the department in which [he was] employed.” His conduct is thereby designated as grounds for disciplinary action under the *Metropolitan Civil Service Rules*, Section 6.7: 11. And, without further discussion, it is concluded that, just as his actions violated the departmental prohibition against “Conduct Unbecoming an Employee of the Department,” his behavior likewise violated the broader prohibition against “Conduct unbecoming an employee of the Metropolitan Government,” contained in the *Metropolitan Civil Service Rules*, Section 6.7: 33.

9. Re: Disciplinary Action.

Pursuant to Section 6.5 of the *Metropolitan Civil Service Commission Rules*, an employee may be disciplined by means of: (1) suspension, (2) demotion, or (3) dismissal. The Metropolitan Nashville Police Department’s General Order 09.08, Discipline and Corrective Action, provides that violation of the requirements of Departmental General Orders may result in sanctions ranging from an oral reprimand up to and including termination, depending upon the seriousness of the offense and other mitigating/aggravating factors. In this case, the Department terminated the Grievant’s employment as a sanction for the enumerated infractions. That decision was based on the egregious nature of his actions, which by their nature, involved causing serious bodily injury to a defenseless citizen, committing a criminal act, publically bringing discredit to the Department, and exposing the Metropolitan Government to financial liability [in this case, a \$30,000.00 settlement]. The Grievant was employed as a Police Officer, a position that requires adherence to a high sense of duty and standard of conduct, and must command the respect and confidence of other employees of the Department (including his supervisors), as well as the public at large. The Grievant’s actions resulted in a loss of his

supervisors' confidence and respect; they can no longer trust his judgment or his actions.⁴ As a result of his actions on November 7, 2010, he has lost his value to the Police Department and the Metropolitan Government.

10. It is concluded that the Grievant's actions constituted serious violations of the Metropolitan Nashville Police Department's General Orders, and the *Metropolitan Civil Service Commission Rules*. And, although the MNPD prefers implementation of progressive discipline for its employees, sanctions must be administered at the step which is most appropriate for the misconduct. As the courts have recognized in state employee cases dealing with progressive discipline provisions;

. . . the key word . . . is 'appropriate.' . . . (T)he language of these provisions does not mandate application of discipline in a routine fashion without regard to the nature or severity of the behavior it is intended to address. The supervisor has discretion to determine what punishment fits the offense.

Berning v. State, 996 S.W.2d 828, 830 (Tenn. App. 1999). The seriousness of the violations disclosed by the facts of this case argue in favor of a serious and significant sanction to address the proven misconduct. In light of the facts of this case, the appropriate disciplinary sanction is termination of the Grievant's employment.

Accordingly, based upon these findings, conclusions and analysis, and upon full consideration of the testimony and other evidence submitted by the parties, arguments of counsel, and the entire record, it is hereby found and determined that the Metropolitan Government and the Metropolitan Nashville Police Department have met their burden of proof, and have established by a preponderance of the evidence that the Grievant, Jonathan Smith, (1) violated specified General Orders of the Metropolitan Nashville Police Department, and Rules/Regulations of the Metropolitan Civil Service Commission, as charged; and, (2) that the

⁴ Deputy Chief Todd Henry testified that he believed termination of Smith's employment was necessary "because of the publicity, liability and basically just his conduct is not something that I, as a Deputy Chief, would allow [by] an officer in a police department."

decision to terminate his employment, imposed as a disciplinary sanction, is appropriate, and warranted by his conduct.

The Department's termination of the Grievant's employment is therefore upheld, and the Grievant's appeal is hereby DISMISSED.

It is so Ordered.

Entered and effective this 11 day of June, 2012 Randall LaFevor, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 11 day of June, 2012

A handwritten signature in black ink that reads "Thomas G. Stovall". The signature is written in a cursive style with a large, sweeping initial 'T'.

Thomas G. Stovall, Director
Administrative Procedures Division