8-4-2011

METROPOLITAN NASHVILLE POLICE DEPARTMENT, Petitioner, Vs. JAMES HAMLET, Grievant

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IN THE MATTER OF:

METROPOLITAN NASHVILLE POLICE DEPARTMENT,
Petitioner

Vs.

JAMES HAMLET,
Grievant

DOCKET NO: 43.02-110547J

INITIAL ORDER

This contested case came to be heard on August 4, 2011, in Nashville, Tennessee, before Administrative Judge Lynn M. England, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Metropolitan Government of Nashville and Davidson County Civil Service Commission. Ms. Jennifer Cavanaugh, Assistant Metropolitan Attorney, represented the Davidson County Sheriff’s Office. The Grievant, James Hamlet, was present and was represented by Mr. Jeff Cherry of the Wilson County Bar.

This matter became ready for consideration upon the filing of Proposed Findings of Fact and Conclusions of Law on October 4, 2011.

The subject of this hearing was whether the Metropolitan Nashville Police Department (MNPD) properly suspended Officer Hamlet for twelve days and also terminated his employment for conduct in violation of MNPD General Orders.

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that the Grievant should be reinstated to his former position with the MNPD with a twelve (12) day suspension. This determination is based on the following:
PROCEDURAL HISTORY

On November 10, 2010, Metro Police Department Chief Steve Anderson notified Sergeant James Hamlet that he was charged with violating the following policies and procedures:

1. MNPD General Order 06-05, "Deportment and Personal Appearance VII Personal Behavior: E. Honest & Truthfulness;
2. MNPD General Order 05-08, Police Vehicle Policy and Procedures, IX. Control Provisions – Vehicular Operation: L. Automatic Vehicle Locator (AVL) and Daily Activity Sheets;
3. MNPD General Order 99-09, Secondary Employment, VII. Control Provisions; and
4. Civil Service Rules; Section 6.7 Grounds for Disciplinary Action (11) and (13).

Sergeant Hamlet requested a hearing before the disciplinary board wherein he was found not guilty of violating MNPD General Order 06-05. He was found by the disciplinary board to be guilty of violating MNPD General Orders 05-08 and 99-09 with a recommended discipline of six (6) days suspension for violation of each of the other two (2) General Orders for a total of twelve (12) days suspension. Deputy Chief Damian Huggins reviewed the recommendations of the disciplinary board. Deputy Chief Huggins found Sergeant Hamlet guilty of violating MNPD General Order 05-05 overturning the decision of the disciplinary board and upholding the decision of the board as to the twelve (12) day suspension for the other two violations.

Sergeant Hamlet appealed Deputy Chief Huggin’s decision by requesting a grievance hearing before the Civil Service Commission of the Metropolitan Government of Nashville and Davidson County. The de novo contested case was heard on August 4, 2011.
FINDINGS OF FACT

1. The Grievant, James Hamlet, was employed as a Sergeant with the MNPD at the Hermitage Precinct during the relevant period of time. Lieutenant David Corman was his supervisor.

2. Grievant was scheduled to work the Ode to Otha event on May 31, 2008. As a prerequisite for any employee wishing to engage in secondary employment, they are required to complete and submit an MNPD Form 150 through his or her chain of command.

3. Grievant failed to complete the MNPD Form 150 prior to working the Ode to Otha event.

4. In October 2006, Lt. Corman instructed those in his chain of command to log on to their Mobile Data Computer ("MDC") to allow the Automatic Vehicle Locator ("AVL") to transmit its data, as required by General Order 05-08, Police Vehicle Policy and Procedures IX.

5. Lt. Corman also allows supervisors to drive their police vehicles, that are equipped with the AVL/MDC units, to do so without logging on, in some circumstances. According to Lt. Corman, he informed his supervisors that circumstances such as short distances were exempt from logging on. An example of a short distance was from Murfreesboro Road to Nolensville Road.

6. On May 16, 2008, Lt. Corman transported Sgt. William Keeter to the Metro garage to pick up an extra police vehicle - car #7195. This vehicle was available through Lt. Corman for use by his traffic supervisors on an "as needed" basis.

7. While at the garage, Lt. Corman noticed that it was taking a long time for the MDC in car #7195 to "boot up".

8. Lt. Corman subsequently requested an AVL report on car #7195 to determine if the computer had been utilized but he was unable to obtain a report.
9. Sgt. Hamlet was the last supervisor to use car #7195. He turned in his car, #1398, for maintenance on Friday, April 18, 2008 and was assigned to car #7195.

10. Sgt. Hamlet attended core in-service training from April 21 – April 24, 2008. He returned car #7195 to the fleet garage on Monday, April 28, 2008.  

11. Lt. Corman requested Vanessa Sponaugle to “pull” the gas card report on car #7195 on May 15, 2008 by email. However, his testimony was that he inquired about the gas card as a result of the May 16, 2008, MDC updating of the tables.

12. On May 22, 2008, at the conclusion of an unrelated meeting, Lt. Corman asked Sgt. Hamlet whether he had driven car #7195 during his in service training.  

13. Sgt. Hamlet confirmed that he did drive car #7195 during his in service training which was between the dates of April 18 and April 28, 2008, but not every day.

14. Lt. Corman also asked Sgt. Hamlet if he had turned the computer on. Sgt. Hamlet replied that he used the car and the computer was on.

15. Sgt. Hamlet has been disciplined previously for violating MNPD policy on Place of Duty and Responsibility in 2007. Those charges were aggravated by the fact that Sgt. Hamlet failed to comply with orders from his supervisor regarding the usage of his MDC.

16. Lt. Corman again asked Sgt. Hamlet on May 27, 2008, if he turned on the MDC to which Sgt. Hamlet replied yes. Lt. Corman audiotaped this conversation but failed to preserve the audiotape of the conversation. In addition, Lt. Corman did not inform Sgt. Hamlet that he was taping the conversation.  

17. Detective Chad Gish, of the MNPD Surveillance and Investigative Support Section was asked by Lt. Corman to perform a forensic analysis of the MDC from car #7195 between April 18, 2008 and April 28, 2008. Detective Gish opined that the computer had

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1 Sgt. Hamlet lives a short distance, within ten minutes or so, of the training academy.

2 Lt. Corman did not advise Sgt. Hamlet that he was under investigation.

3 Again, Lt. Corman did not advise Sgt. Hamlet that he was under investigation.
not been powered up and used between those dates. In fact, it had not been powered up and used between January 25, 2008 and May 16, 2008.

18. Detective Gish explained, however, that it is possible for an MDC to be powered on and powered off without creating a log.

19. Brian Long, is the computer-aided dispatch administrator at the Emergency Communication Center in Nashville. He maintains the system that logs whether police officers log in or log out of the computer aided dispatch system.

20. Mr. Long opined that an MDC could be powered on and not logged in and there would never be a record of it.

21. Retired Detective Curtis Gardner was the Office of Professional Accountability detective assigned to investigate the charges of secondary employment and untruthfulness lodged against Sgt. Hamlet.

22. During his interview of Sgt. Hamlet, Detective Curtis never asked him if Lt. Corman had asked Sgt. Hamlet if he was logged into the MDC or AVL. Sgt. Hamlet stated to Det. Gardner that he did turn on the MDC in car #7195 but he did not log in.

23. Det. Gardner did not question Det. Gish as to the difference between powering on and logging in to the MDC and AVL.


25. Lieutenant Mitchell Fuhrer was assigned to the Office of Professional Accountability after the investigation of Sgt. Hamlet but before the disciplinary process.

26. Lt. Fuhrer did not interview any witnesses nor did he read the transcribed interview of Sgt. Hamlet by Det. Gardner. He based his decision to approve the findings solely on the reading of Det. Gardner’s report.

27. Lt. Fuhrer was not aware that Lt. Corman had audiotaped one of the conversations with Sgt. Hamlet. However, as an investigator, he would have wanted to listen to the audio tape as a part of his investigation.
CONCLUSIONS OF LAW

   B. An employee wishing to engage in any secondary employment must first request and obtain permission in writing on MNPD Form 150, Secondary Employment Request, through his/her chain of command. Hall approved secondary employment requests shall expire one year from the date of submission. In order to continue the secondary employment, a new MNPD Form 150, Secondary Employment Request, must be submitted for approval thirty days prior to the expiration date of the original request.

2. MNPD General Order 05-08, Police Vehicle Policy and Procedure, IX. Control Provisions – Vehicular Operation: L. Automatic Vehicle Locator (AVL) and Daily Activity Sheets:
   Personnel using a vehicle equipped with an Automatic Vehicle Locator (“AVL”) device shall adhere to the following provisions:
   a. When on duty, personnel shall log on to the Mobile Data Computer (“MDC”) in the vehicle. This is required for the Automatic Vehicle Locator (“AVL”) to transmit its data. Personnel shall indicate their status as “available.”
   b. Whenever utilizing a police vehicle equipped with AVL outside their regular work shift, such as when traveling to court, department personnel shall log on to the MDC but show their status as “not available”. This status is required so that the vehicle’s location data is captured, but it will not interfere with the normal dispatching of calls.

3. MNPD General Order 06-05, Deposition and Personal Appearance, VII. Personal Behavior: E. Honesty and Truthfulness:
   Employees shall be honest and truthful. Truthfulness shall apply when an employee makes a materially false statement with the intent to deceive. A statement is material when, irrespective of its admissibility under the rules of evidence, it could have affected the course or outcome of an investigation or official proceeding.

4. Metro Nashville’s Civil Service Rule, 6.7 provides as follows:
   The following constitute grounds for disciplinary action (emphasis added):
   1. Neglect or failure to perform official duty.
   2. Deficient or inefficient performance of duties.
   3. Insubordination toward the supervisor.
   4. Absence without notification or approval for leave.
   5. Neglect or disobedience to the lawful and reasonable orders given by a supervisor.
   6. Drinking intoxicating beverages, using drugs not specifically prescribed to the employee by a licensed physician or using a controlled substance while on duty, whether under the influence of the beverage, drug, or controlled substance or not.
   7. Being under the influence of intoxicating beverages or drugs not specifically prescribed for the employee by a licensed physician or controlled substances when on duty or upon reporting to duty.
8. Public Intoxication while off duty, in uniform, or wearing any other evidence of being an employee of the Metropolitan Government or when driving a government owned vehicle.
9. Possession of illegal drugs or a controlled substance while on or off duty or any violation of Civil Service or departmental rules, policies, or procedures related to the substance abuse program.
10. Violation of any provision of the Metropolitan Charter or any written Executive or Administrative Orders.

**11. Violation of any written rules, policies or procedures of the department in which the employee is employed.**
12. Violation of any of the rules or regulations of the Metropolitan Civil Service Commission.

**13. Dishonesty.**
15. Conviction of a felony.
16. Inability to perform duties, when reasonable accommodation has been considered and cannot be made.
17. Neglect or failure of any employee to properly and promptly make reports or furnish information specifically required by the Civil Service Commission.
18. Excessive absenteeism and/or excessive tardiness and/or abuse of sick leave.
19. Any attempt (outside of official Commission meetings), directly or indirectly, by an employee to influence the judgment of the Metropolitan Civil Service Commission or any member thereof, with reference to any issue pending before the Commission.
20. Violation of safety rules, regulations or procedures.
21. Unauthorized sleeping on duty.
22. Damage to or loss of Metropolitan Government property caused by negligent acts of the employee.
23. Unlawful or unauthorized possession of a weapon, as defined by applicable laws, while on duty or while on Metro property.
24. Using abusive or profane language so as to create a disturbance in the work place or when directed toward a member of the public.
25. Gambling on Metro property or while on duty.
26. Falsifying employment or promotional application or any official document of Metro Government.
27. Disclosing confidential information to unauthorized persons.
28. The use or threat of violence or intimidation when directed toward another person.
29. Participation in strikes, work slow-downs, boycotts, sick-ins, picketing for the purpose of preventing others from coming to work or other similar job actions.
30. Discrimination on the unlawful basis of race, sex, color, age, religion, national origin, handicap or lawful political or employee group affiliation.
31. Participation in a pattern of harassment toward an employee of Metropolitan Government.
32. Any failure of good behavior which reflects discredit upon himself, the department and/or the Metropolitan Government.
33. Conduct unbecoming an employee of the Metropolitan Government.
5. The burden of proof is on Metro to show by a preponderance of the evidence that the disciplinary action was justified and appropriate. Hamilton vs. Zimmerman, 37 Tenn. 39 (1857).

6. This is a de novo proceeding, and no presumption of correctness attaches to the action of the agency. The burden of proof rests with the agency and the agency must prove by a preponderance of the evidence that 1) the Grievant acted or failed to act as the agency alleges; 2) the Grievant’s action constitutes a disciplinary offense; and 3) the recommended discipline is appropriate for the given offense. Big Fork Mining Co. v. Tennessee Water Quality Control Board, 620 S.W. 2d 515 (Tenn. App. 1981), (interpreting Tennessee Civil Service law).

**ANALYSIS**

The Metropolitan Government met its burden of proof by a preponderance of the evidence that Sgt. Hamlet violated MNPD General Order 99-09 “Secondary Employment” (VII). This General Order specifically requires that an employee wishing to engage in any secondary employment must first request and obtain permission in writing on MNPD Form 150, Secondary Employment Request, through his/her chain of command. Sgt. Hamlet failed to secure MNPD Form 150, Secondary employment request for the Ode to Otha event on May 31, 2008. It is determined that six days suspension for violation of MNPD General Order 99-09 is appropriate.

The Metropolitan Government met its burden of proof by a preponderance of the evidence that Sgt. Hamlet violated MNPD General Order 05-08, "Police Vehicle Policy and Procedures". This General Order specifically requires the officer to “log on” to the Mobile Data Computer, not to just turn it on. There is ample proof in the record that Sgt. Hamlet turned or powered on the MDC in car #7195. However, there is also proof that he failed to “log on.” Consideration is given to the fact that Lt. Corman admitted that he had informed his supervisors, who drive their police vehicles that are equipped with the AVL/MDC units,
they could do so without logging on, in some circumstances. According to Lt. Corman, he informed his supervisors that circumstances such as short distances were exempt from logging on. Sgt. Hamlet lives within ten minutes or so of the training academy. However, giving due consideration to the fact that Sgt. Hamlet has received previous discipline, which was aggravated by improper usage of his MDC, it is determined that six days suspension for violation of MNPD General Order 99-09 is appropriate.

The Metropolitan Government failed to meet its burden of proof by a preponderance of the evidence that Sgt. Hamlet violated MNPD General Order 06-05, Deportment and Personal Appearance, VII. Personal Behavior: E. Honesty and Truthfulness. This General Order applies when an employee makes a materially false statement with the intent to deceive. The statement being material when...it could have affected the course or outcome of an investigation or official proceeding.

Lt. Corman could not remember exactly what was said between he and Sgt. Hamlet concerning the usage of the MDC and AVL of car #7195. The exact language is important when discussing whether a computer was turned on or logged into.

While Lt. Corman asked Sgt. Hamlet about his use of car #7195, he did not inform him it was an investigation. Furthermore, Lt. Corman secretly audiotaped one of the two conversations, then misplaced the audiotape. This is rather unusual for a police officer with the years of experience of Lt. Corman.


Detective Gish and Brian Long both confirmed that Sgt. Hamlet could have powered on the MDC in car #7195 without logging in and there would be no record.
There is no proof in the record that Sgt. Hamlet made a materially false statement to Lt. Corman as to his use of the MDC and AVL in car #7195. For this reason his termination should be OVERTURNED.

Accordingly, it is hereby ORDERED that the Appellant’s termination for violating MNPD General Order 06-05, Deportment and Personal Appearance, VII.

Personal Behavior: E. Honesty and Truthfulness is REVERSED and he should be REINSTATED to his former position with full back pay and benefits, minus a twelve (12) day suspension. The twelve day suspension is for the following violations: a six (6) day suspension for violation of MNPD General Order 99-09 “Secondary Employment” (VII) and a six day (6) suspension for violation of MNPD General Order 05-08, Police Vehicle Policy and Procedure, IX. Control Provisions – Vehicular Operation: L. Automatic Vehicle Locator (AVL) and Daily Activity Sheets

It is so ORDERED.

This Order entered and effective this 27 day of October, 2011 England Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this _____ day of October, 2011.

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Thomas G Stovall, Director
Administrative Procedures Division