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December 2014

## Cary Adkerson vs. Metro Civil Service

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**BEFORE THE CIVIL SERVICE COMMISSION OF THE  
METROPOLITAN GOVERNMENT OF NASHVILLE  
AND DAVIDSON COUNTY**

**IN THE MATTER OF:**

**CAREY ADKERSON**

**DOCKET NO: 43.02-125221J**

**INITIAL ORDER**

This matter came to be heard on August 12, 2014, before Rob Wilson, Administrative Judge, assigned by the Secretary of State, and sitting for the Metropolitan Civil Service Commission (“Metro”) in Nashville, Tennessee. Cynthia E. Gross, Esq., represented the Metropolitan Nashville Police Department (“MNPDP”). The Appellant, Carey Adkerson, was represented by Kim C. Gilleland, Esq.

The subject of the hearing was whether the proposed termination of the Appellant from the Metropolitan Police Department (“the Department”) should be upheld.

After consideration of the record in this matter, it is determined that the Appellant should be **REINSTATED** to his former position with three one-day suspensions.

**PROCEDURAL HISTORY**

On March 5, 2014, MNPDP held a disciplinary hearing before a board of sworn personnel. Mr. Adkerson was present with counsel and presented his defense. Following the disciplinary hearing, MNPDP imposed sanctions against Mr. Adkerson which resulted in his termination from MNPDP. Mr. Adkerson’s charges are as follows:

**Incident 1 (Control Number 073713C):**

1. MNPD Manual Section 4.20.040(A), Adherence to Policy  
To wit; MNPD Manual Section 3.70.090(A), *Appearing in Court*
2. Metropolitan Civil Service Rules  
Section 6.7, Grounds for Disciplinary Action  
2. *Deficient or Inefficient Performance of Duties*

**Incident 2 (Control Number 0584813C):**

1. MNPD Manual Section 4.20.040(B), *Adherence to Law* (unauthorized use of disabled parking space)
2. MNPD Manual Section 4.20.040(G), *Courtesy*
3. Metropolitan Civil Service Rules  
Section 6.7, Grounds for Disciplinary Action  
11. Violation of any written rules, policies, or procedures of the department in which the employee is employed

**Incident 3 (Control Number 068213D):**

1. MNPD General Order 09-03, Department and Personal Appearance  
Section VIII, Official Obligations  
*F. Deficient or Inefficient Performance of Duties*
2. MNPD General Order 09-03, Department and Personal Appearance  
Section VIII, Official Obligations  
*S. Failure to Cooperate/Withholding Information*
3. MNPD General Order 09-03, Department and Personal Appearance  
Section VIII, Official Obligations  
*F. Deficient or Inefficient Performance of Duties*
4. MNPD General Order 09-03, Department and Personal Appearance  
Section VIII, Official Obligations  
*E. Honesty & Truthfulness*

5. MNPD General Order 09-03, Department and Personal Appearance  
Section VIII, Official Obligations  
*F. Deficient or Inefficient Performance of Duties*
6. Metropolitan Civil Service Rules  
Section 6.7, Grounds for Disciplinary Action  
13. *Dishonesty*
7. Metropolitan Civil Service Rules  
Section 6.7, Grounds for Disciplinary Action  
2. *Deficient or Inefficient Performance of Duties*

Mr. Adkerson was found guilty on all counts and a termination of his employment was imposed as well as an additional 38 day suspension. The end result of the Department's sanction yielded Mr. Adkerson's termination and the Department argued this result can be reached in one of two ways: 1) the actual termination based on Untruthfulness and/or one of the Deficient and Inefficient Performance of Duties charges; or because 2) the recommended cumulative suspension days total 38 and said days would be considered to have been acquired in a single 12 month period. Rule 6.5 of the Civil Service Commission states that if an employee acquires more than 30 suspension days in a 12 month period, that is grounds for termination. Mr. Adkerson's employment was terminated on March 5, 2014.

### **FINDINGS OF FACT**

1. Mr. Adkerson was employed by MNPD in February, 1991. He was employed by MNPD for approximately 23 years when he was terminated on March 5, 2014. Mr. Adkerson worked in the Field Operation Bureau, specifically in the traffic unit and the

DUI unit, for a majority of his career. Mr. Adkerson also regularly worked the DUI grant, which is an extra job wherein the goal is to locate and arrest intoxicated drivers.

### **Incident 1 – Failure to Appear in Court**

2. On June 3, 2013, Mr. Adkerson was scheduled to appear in General Sessions Court, but he failed to appear and failed to notify Court Appearance of his unavailability. Mr. Adkerson acknowledged that he received a subpoena and the he had inadvertently deleted the court date from his electronic calendar when he intentionally deleted a cancelled appearance in another court, scheduled for the same day. Mr. Adkerson does not dispute that he failed to appear in court and pled guilty to that charge. Mr. Adkerson's last incident of failing to appear in court was in May, 2010, more than three years prior to this incident. He received one suspension day as a result and he accepted that punishment on August 11, 2010. The incident was treated as a Category D offense, which provides for a 1 to 4 day suspension. The associated retention period is 36 months, thus the June 3<sup>rd</sup> violation should have been treated as a first offense, which provides for a 1 to 4 day suspension.

### **Incident 2 – Courtesy and Adherence to Law**

3. On April 23, 2013, Mr. Adkerson went to Court at the Justice A.A. Birch Building and inadvertently parked in a handicapped parking space under the James Robertson Parkway overpass on Gay St. A short time later, a disabled driver was looking for a vacant handicapped parking space and became very upset to see that a police car was parked in a handicapped parking space. While this person was walking to the courthouse,

he observed Mr. Adkerson walking to the patrol car and attempted to speak to him. Mr. Adkerson admittedly ignored the person because he thought he was a homeless subject yelling at him.

4. The disciplinary grid states the penalty category for an Adherence to Law violation varies based on the severity of the violation. The Department assigned this violation as a Class E category, which provides for the punishment range to be a written reprimand to a 2 day suspension for a first offense. Although a written reprimand was the original suggested discipline by Mr. Adkerson's chain of command, Mr. Adkerson received a written reprimand and a 1 day suspension.

### **Incident 3 – (1) Deficient or Inefficient Performance of Duties**

5. Most of the allegations against Mr. Adkerson are the result of multiple complaints by Mr. Jeffrey Baez, a man arrested for DUI by Mr. Adkerson on May 2, 2011. Mr. Baez first complained on the date of the arrest and stated that he was wrongly charged with an Implied Consent Violation because he stated he was never offered a breath test. After a thorough investigation by Detective Ron Carter of the Office of Professional Accountability (hereinafter OPA), Mr. Baez's first complaint was not sustained due to several conflicting statements he made which actually indicated he was offered a breath test and only consented to give a blood sample.

6. Over one year later, on October 24, 2012, Mr. Baez filed a second complaint, stating he had newly discovered evidenced that conflicted with Mr. Adkerson's preliminary hearing testimony on August 2, 2011, as to where the Field Sobriety Tasks (hereinafter FSTs) took place and where Mr. Adkerson read Mr. Baez the Implied

Consent Law. However, two days later, Mr. Baez pled guilty to Reckless Endangerment and received a suspended sentence of 11 months and 29 days. He was placed on supervised probation for the term of his sentence.

7. The Inefficient Performance of Duties charge resulted from the discrepancies between Mr. Adkerson's memories of the event surrounding Mr. Baez's arrest and what the Department is alleging actually happened. Mr. Baez stated that he submitted to FSTs at the scene of the traffic stop but Officer Adkerson recalls the FSTs taking place in Booking. Mr. Baez provided video recordings from the sallyport area of Booking as evidence that the FSTs did not occur there as well as the fact that Mr. Adkerson never walked him into the officer workroom where the Intoxilyzer was located.

8. The video recordings of the sallyport were shown and testified about by several of the Department's witnesses. Many of the Department's witnesses agreed that a large portion of the sallyport is not visible on the videotape. There is also a back entrance into the sallyport that is not visible on the videotape. Additionally, there is a second entrance to the facility that is also not visible on the videotape. The doorway into the officer workroom is also not visible on the video recording that was submitted.

9. The Department recommended that this charge be treated as a Class C 2nd offense, aggravated to increase the punishment to 10 days due to the fact that in September, 2009, Mr. Adkerson had testified about the wrong person during a traffic court hearing. Mr. Adkerson had prefaced his testimony in that case with the statement, "If the person in front of me is the person I recall..." It turned out that Mr. Adkerson had confused two different female offenders that were driving similar cars and ticketed within

a short time of each other. He was punished for this offense in April, 2011, with a two day suspension.

**Incident 3 – (2) Failure to Cooperate/Withholding Information**

10. The Department states that Mr. Adkerson did not return emails from the District Attorney's Office (hereinafter DA's Office) requesting the backside of Form 132. The DA's Office sent 4 emails over the course of 12 months requesting the Form 132 from Mr. Adkerson, but his email account did not show any return emails. An Affidavit written by Assistant District Attorney Elizabeth Foy on July 8, 2014, states that she was never provided with the backside of Form 132 and never received an emailed response from Mr. Adkerson.

11. Mr. Adkerson testified that he did not believe he responded via email to the requests for the Form 132, but he did recall speaking to Ms. Foy in court regarding the fact that he had provided all the information he had about the case, including his copy of Form 132, which was just the front side of the Form 132. Ms. Foy did not testify in person and was therefore not cross-examined.

12. For this offense, which basically amounts to lost paperwork with no conclusion of who was at fault, MNPD issued a 20 day suspension.

**Incident 3 – (3) Deficient or Inefficient Performance of Duties**

12. This charge is the same as the previous charge, and stems from the same incident. MNPD alleges that Mr. Adkerson didn't turn in the back page of Form 132. However, upon cross-examination, Captain Richter acknowledged that the form could have been misplaced by a supervisor after the officer turns in the paperwork since the paperwork

originates with the officer, gets turned over to the supervisor, and then the supervisor reviews it and turns it over to the Records Division. There does not appear to be a dispute that the paperwork was completed, just that it was not turned in to records and the back page was missing. It seems important to also note that collective Exhibit 9 contains four other Form 132s that Mr. Adkerson completed in the days surrounding Mr. Baez' arrest. The Department could not say that these dates were the only days that Mr. Adkerson made DUI arrest, but the sheer number of forms produced shows just how many DUI arrests Mr. Adkerson made in just a 10 day period, which likely contained only 6 working days. Aside from confirming how many DUI arrests Mr. Adkerson routinely makes, this exhibit is further evidence that he routinely and correctly completes the requisite paperwork and turns it in to his supervisors.

### **Incident 3 – (4) Honesty and Truthfulness**

13. In this charge MNPB alleges that Mr. Adkerson was untruthful when he stated that he was testifying during Mr. Baez's preliminary hearing from his independent memory and that he had Mr. Baez perform the field sobriety tests at Booking and that Mr. Baez was asked to submit to a breath test in the officer workroom. Notwithstanding the fact that a dangerous driver was successfully taken off the road by Mr. Adkerson, MNPB alleges that Mr. Adkerson actually asked Mr. Baez to perform the field sobriety tests at the scene of the traffic stop, and for this MNPB feels Mr. Adkerson should be terminated.

### **Incident 3 – (5) Deficient of Inefficient Performance of Duties**

14. This charge also stems from the same incident and is a rehashing of the other charges in this incident. To sum it up, MNPD alleges that based on the totality of the circumstances, and a pattern of official proceeding misstatements, negligent documentation, and unwillingness to comply with policies and procedures, that Mr. Adkerson cannot continue in the capacity of representing the community as a police officer. There are no new facts to support this “catch-all” charge; MNPD based this charge on a combination of the previous individual charges.

### **APPLICABLE LAW and ANALYSIS**

1. 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 Rules of the Metropolitan Nashville Police Department and the Metropolitan Government, as charged; and, (2) if so, whether the sanction imposed by the Department was appropriate.

2. MNPD alleges that Mr. Adkerson violated the following rules and regulations:

MNPD Manual Section 3.70.090(A), *Appearing in Court*

Metropolitan Civil Service Rules Section 6.7, Grounds for Disciplinary Action , *Deficient or Inefficient Performance of Duties*

MNPD Manual Section 4.20.040 (B), *Adherence to Law* (unauthorized use of disabled parking space)

MNPD Manual Section 4.20.040(G), *Courtesy*

Metropolitan Civil Service Rules Section 6.7, Grounds for Disciplinary Action, Violation of any written rules, policies, or procedures of the department in which the employee is employed

MNPD General Order 09-03, Department and Personal Appearance  
Section VIII, Official Obligations  
*F. Deficient or Inefficient Performance of Duties*

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*F. Deficient or Inefficient Performance of Duties*

Metropolitan Civil Service Rules  
Section 6.7, Grounds for Disciplinary Action  
*13. Dishonesty*

Metropolitan Civil Service Rules  
Section 6.7, Grounds for Disciplinary Action  
*2. Deficient or Inefficient Performance of Duties*

### **ANALYSIS AND CONCLUSIONS**

It appears that the MNPD has attempted to stack the charges and the disciplinary action against Mr. Adkerson in an effort to support their decision to terminate his employment. After hearing all of the testimony and considering all the exhibits, the

record only conclusively establishes that Mr. Adkerson committed three violations: He failed to appear in court, he parked in a handicapped space, and he ignored a citizen who wanted to speak with him in the sidewalk. Mr. Adkerson testified that he inadvertently deleted the court appearance from his calendar. This is an honest mistake that could be made by anyone. Additionally, this incident occurred more than 36 months after his previous offense of being late to court. Counsel for Mr. Adkerson correctly argued that the retention period for an offense begins with the date the offense occurs, not the date the punishment is imposed. If the retention period began with the date the punishment was imposed then the Department could withhold issuing punishment indefinitely and hold the offense in suspense to be used to enhance a subsequent offense at any time in the future. Accordingly, it is CONCLUDED that Mr. Adkerson failed to show up for a court appearance and for that offense he should receive a one-day suspension.

As for the second incident, the Department did establish that Mr. Adkerson parked in a handicapped parking space and ignored a citizen that attempted to speak with him. This incident clearly violated MNPD Manual Section 4.20.040 (B) and (G), Adherence to Law, and Courtesy, and for these violations Mr. Adkerson should receive a one-day suspension for each, for a total of two days suspension.

As for the numerous allegations charged in Incident 3, the Department has failed to establish by a preponderance of the evidence that Mr. Adkerson is guilty of the alleged violations. The proof shows that Mr. Adkerson testified based on his recollection of the events surrounding the arrest of Mr. Baez. While the possibility exists that he may be mistaken as to the location of where the field sobriety tests were conducted, this error

does not rise to the level of creating a pattern that reflects so poorly on Mr. Adkerson's ability to perform his job that he should be suspended for 10 days. Moreover, Mr. Adkerson has nothing to gain by not being truthful about where the field sobriety tests were performed. A police officer is permitted to do field sobriety tests at the scene of the traffic stop or at booking. Accordingly, the charge of Deficient and Inefficient Performance of Duty as it related to where Mr. Baez performed his field sobriety tests is DISMISSED.

The Department's charge of *Failure to Cooperate/Withholding Information* should be dismissed in its entirety as well. Mr. Adkerson fully participated in the criminal prosecution of Mr. Baez, the result of which was a criminal conviction. Mr. Adkerson also fully cooperated in the multiple OPA investigations sparked by Mr. Baez's complaints. No witness has testified otherwise. Mr. Adkerson stated that he did communicate with Ms. Elizabeth Foy about Mr. Baez's case in person and perhaps via telephone and that he provided copies of all paperwork he had in his possession. Nothing more could have been done in this situation and Mr. Adkerson fully cooperated on all levels. This charge is DISMISSED.

Another *Deficient or Inefficient Performance of Duty* charge stacked on by the Department is again based on the same alleged failure of Mr. Adkerson to turn in Form 132, front and back. Again, the burden of proof is on the Department to prove that Mr. Adkerson did not turn this form in, but the only proof they offered is the fact that the Form supposedly never made it to records. The log sheets were not provided as exhibits for this fact to be confirmed, but Captain Richter testified she researched it and was unable to locate Form

132 from Mr. Baez's arrest. Captain Richter also outlined the process whereby the officers turn their paperwork in to their shift supervisor and then the supervisor turns the paperwork in to Records. Mr. Adkerson testified that he handed the DUI paperwork in to a supervisor, but he does not know what happened to it after that. Mr. Adkerson had no control over what happened with the Form 132 after he turned it in. The Department provided numerous other Form 132s completed by Mr. Adkerson in the days surrounding Mr. Baez's arrest, which supports the fact that he consistently followed policy and turned in the requisite paperwork. This charge is DISMISSED.

The Department's proof failed to establish that Mr. Adkerson is guilty of *Untruthfulness* or that he has ever been untruthful in either the prosecution of Mr. Baez's criminal actions or in the OPA investigation conducted regarding Mr. Baez's arrest. The Department has the burden of proof to show that Mr. Adkerson intentionally misrepresented a material fact during the course of an investigation or official proceeding. The Department has not met this burden of proof. There is no reason for Mr. Adkerson to lie about the location of the FSTs and the location that Mr. Baez refused to provide a breath sample. Aside from the fact that neither of these facts are material facts, Mr. Adkerson was, at worst, mistaken about the location of the FSTs and breath test refusal. However, the Department has tried to shift the burden to Mr. Adkerson by using incomplete "evidence" and stating that said evidence supports their position. Testimony established that the majority of the sallyport is not visible on the videotape procured by Mr. Baez and used as "evidence" in the prosecution of Mr. Adkerson, and the Department expects Mr. Adkerson to explain why he is not seen on the video executing the FSTs. It is entirely possible that he conducted them in

the portion of the sallyport that is not visible on the video. It is also possible that he was simply mistaken about where he conducted the FSTs, but a mistake in memory is not an intentional misrepresentation. This is also the conclusion that the OPA investigators arrived at after completing their investigation of Mr. Baez's complaint. Mr. Adkerson never intentionally lied about anything regarding this matter. Mr. Adkerson has continued to maintain that he conducted the FSTs at Booking and this remains his memory of this incident. This charge is not supported by the evidence and is DISMISSED.

Finally, the Department alleges another *Deficient and Inefficient Performance of Duty* charge saying that Mr. Adkerson did such a poor job with Mr. Baez's arrest and subsequent prosecution that he should be terminated because he is unfit to be a police officer. This statement has no evidentiary support. Mr. Adkerson has maintained his version of the events surrounding Mr. Baez's arrest, even in light of the Department's attempt to prove that he was wrong about his recollection and their attempt to say he intentionally misled the Criminal Courts, the Police Department, and the various people involved in the different stages of this disciplinary action. Mr. Adkerson's worst case scenario is that he is, in fact, mistaken in his recollection of where he conducted the FSTs and where Mr. Baez refused to submit to the breath test. This minor mistake is certainly not worthy of saying Mr. Adkerson needs to be fired.

One additional point should be mentioned: Mr. Adkerson arrested a man for DUI on May 2, 2011. That man was presumably a danger to himself or others on the night in question, and Mr. Adkerson successfully removed that man from the road before he had a chance to cause an accident and possibly injure someone. The man that Mr. Adkerson

arrested that night subsequently pled guilty to a crime, which obviously proves that he was doing something illegal when Mr. Adkerson pulled him over. Then that man immediately filed a complaint against Mr. Adkerson which, after an investigation, was found to be not sustained by the Office of Professional Accountability. Then almost a year and a half later the same man files another complaint against Mr. Adkerson because he alleges that he didn't perform his field sobriety tests in the location where Mr. Adkerson said he performed them, and due to this accusation Mr. Adkerson is fired. Hence, if Mr. Adkerson had allowed a dangerous driver to remain on the Tennessee highways that evening he would still be employed as a Metro Police Officer. Not only does this make no sense, it also sends the wrong message to anyone with a propensity to drive hazardously on Tennessee's highways.

Mr. Adkerson is, and can continue to be, an exemplary police officer. Two incidents over the course of a 23 year career do not establish a pattern or a significant disciplinary history. He has been a loyal and dedicated employee for the Metro Nashville Police Department for 23 years. Termination is not the appropriate punishment in this case.

Accordingly, it is hereby **ORDERED** that Officer Adkerson's termination is **REVERSED** and he should be **REINSTATED** to his former position with full back pay and benefits, minus three (1) day suspensions for violations of MNPD Manual Section 3.70.090(A), *Appearing in Court*, and MNPD Manual Section 4.20.040(B) *Adherence to Law* (unauthorized use of a handicapped parking space) and MNPD Manual Section 4.20.040(G), *Courtesy*.

This Order entered and effective this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

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Rob Wilson  
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,  
this \_\_\_\_\_ day of \_\_\_\_\_ 2015.



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J. Richard Collier, Director  
Administrative Procedures Division