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Human Resources Dept

MEMORANDUM

Austin Police Department *Office of the Chief of Police*

TO: Joya Hayes, Director of Civil Service
FROM: Brian Manley, Chief of Police
DATE: November 16, 2018
SUBJECT: Indefinite Suspension of Police Officer Gregory Burnett #5887
Internal Affairs Control Number 2018-0496

Pursuant to the provisions of Chapter 143 of the Texas Local Government Code, Section 143.052, and Rule 10, Rules of Procedure for the Firefighters', Police Officers' and Emergency Medical Service Personnel's Civil Service Commission, I have indefinitely suspended Police Officer Gregory Burnett #5887 from duty as a police officer for the City of Austin, Texas effective November 16, 2018.

I took this action because Officer Burnett 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 specific acts committed by Officer Burnett in violation of Rule 10:

I. Officer's Burnett's Initial Injury and Worker's Compensation Reports

Officer Gregory Burnett was involved in an on-duty crash on September 15, 2017. On September 18, 2017, Officer Burnett's chiropractor, Dr. [REDACTED] D.C., submitted to the Austin Police Department (APD) a state mandated Texas Workers' Compensation Work Status Report (DWC-73), placing Officer Burnett on a no-duty status through September 30, 2017. Thereafter on October 2, 2017, Dr. [REDACTED] D.C. submitted a subsequent DWC-73 report, placing Officer Burnett on a no-duty status through October 31, 2017.

Dr. [REDACTED] D.C. did not fully complete Part II, box 13 (c) of either of the DWC-73 reports. Part II, box 13(c) of the DWC- 73 report prompts the injured employee's provider to provide the following information: "*The following describes how this injury prevents the employee from returning to work.*" Dr. [REDACTED] D.C. also did not complete Part IV of the two DWC-73 reports, which require the following information from the provider: "*Treatment/Follow-Up Appointment Information,*" including "*Work Injury Diagnosis Information.*"

The missing information on these two DWC-73 reports precipitated APD Risk Management (RM) to make multiple communication(s) to Officer Burnett and his doctor, imploring them to comply with state law and general orders by submitting properly completed DWC-73 reports to explain and warrant Officer Burnett's absence from work and to ascertain his medical status. Also, on October 11, 2017, APD RM personnel and Officer Burnett's chain of command held an in-person two hour meeting with Officer Burnett to reiterate and clearly explain his obligations under state law and general orders, and to answer any of his questions.

However, APD's communications with Officer Burnett and his doctor were futile. Officer Burnett and his doctor persisted in filing incomplete DWC-73 reports to the APD throughout the end of 2017 and into 2018. Officer Burnett and/or his doctor submitted ten incomplete DWC-73 reports that placed him on no -duty status from September 16, 2017 until February 22, 2018, without explanation or specified reasoning. These reports resulted in Officer Burnett not reporting to work in any capacity through the duration of 2017 and into 2018.

II. Subsequent Medical Examinations and Bona Fide Offers of Employment

These events eventually prompted a review of Officer Burnett's medical condition in an independent Designated Doctor Evaluation. On February 16, 2018, Dr. Dazzle B. Shrestha, D.C., a third party doctor approved by the Texas Department of Insurance – Division of Workers Compensation (TDI-DWC) conducted the evaluation and completed a DWC-73 report indicating Officer Burnett should have only been on a no-duty status from September 16-23, 2017, then he should have been on a limited-duty status from September 23, 2017 through February 16, 2018 and limited-duty status moving forward.

On March 1, 2018, APD RM sent Officer Burnett a Bona Fide Offer of Employment (BFOE) to accommodate the limited-duty status outlined in Dr. Shrestha, D.C.'s DWC-73. Officer Burnett declined the offer and did not report to work. Thereafter, no reports were submitted on Officer Burnett's behalf justifying his absence from work after the expiration of the no-duty status designation by Dr. [REDACTED] D.C. through February 22, 2018. In fact, the next DWC-73 report APD received from Dr. [REDACTED] D.C. was not until May 14, 2018.

On April 4, 2018, Officer Burnett had an out-patient knee surgery for a meniscal tear. On April 12, 2018, Officer Burnett attended a Post-Designated Doctor Required Medical Examination with Dr. John P. Obermiller, M.D., another TDI-DWC approved doctor. Dr. Obermiller, M.D. immediately submitted a DWC-73 report indicating Officer Burnett should have been placed on limited-duty from September 18, 2017 to February 16, 2018, and indicated that he should be placed on limited-duty status moving forward.

APD RM followed up by sending a second BFOE to Officer Burnett on April 25, 2018, accommodating the restrictions set forth in the DWC-73 reports issued by the TDI-DWC approved doctors. Officer Burnett declined the second BFOE and did not report to work.

After receiving no communication from Dr. [REDACTED] D.C. for several months, APD RM finally received a DWC-73 report from Dr. [REDACTED] D.C. on May 14, 2018, which released Officer Burnett to limited-duty status with restrictions, effective May 15, 2018 through July 15, 2018. The limited-duty restrictions issued by Dr. [REDACTED] D.C. were congruent with the restrictions issued by both Dr. Shrestha, D.C. and Dr. Obermiller, M.D.

APD RM followed up by sending Officer Burnett a third BFOE on May 15, 2018, accommodating the restrictions set forth in the DWC-73 reports, including the DWC-73 report submitted by Officer Burnett's doctor. Once again, Officer Burnett declined the offer of employment. Despite being released to limited-duty status and APD's repeated offers of employment, Officer Burnett still has not returned to work in any capacity since the September 15, 2017 crash.

III. Officer Burnett's Continued Refusal to Return to Work

Subsequently, Officer Burnett stopped communicating with APD RM. APD RM Occupational Health and Safety Coordinator Christina Garza made several attempts to communicate with Officer Burnett to discuss the multiple BFOEs and determine if he intended to report to work on or about May 16, 2018 but she received no response.

APD Human Resource (HR) Supervisor Eliza Adcox intervened and contacted Officer Burnett on May 16, 2018, advising him that the limited-duty designation by the three doctors, including his treating doctor, did not justify a no-duty status. On May 17, 2018, Officer Burnett, replied to Ms. Adcox that she is "*not a medical doctor,*" and expressed that he did not intend to report to work, as he concluded he should have been designated no-duty status.

Thereafter on May 22, 2018, Commander Catherine Johnson sent an email to Officer Burnett stating in part that he has not provided sufficient medical documentation to support his absence, including since being placed on limited-duty status by Dr. [REDACTED] D.C. on May 15, 2018. She also advised Officer Burnett that without medical documentation from a doctor supporting a no-duty status, his absence would result in an administrative investigation and possible disciplinary actions.

On May 25, 2018, Officer Burnett responded to Commander Johnson's email in part by stating "*...we are in disagreement. I will not be returning to work in a limited capacity until I reach... MMI (Maximum Medical Improvement)...*"

Following this response, Commander Johnson issued an Internal Affairs (IA) Complaint against Officer Burnett on May 25, 2018, for his continued absence without supervisory approval and insubordination, including but not limited to his failure to follow APD general orders and numerous directives given to him by APD RM, HR, and/or members of his chain of command, dating back to September of 2017 to late May of 2018.

IV. Officer Burnett's 1st IA Interview (September 5, 2018)

IA interviewed Officer Burnett for the first time on September 5, 2018. During his interview, Officer Burnett took no responsibility for the incomplete documentation submitted by him or on his behalf throughout 2017-2018. He placed blame upon his doctor and on APD's personnel and/or representatives.

Officer Burnett also offered no explanation for rejecting the March 1, 2018 BFOE, and his failure to return to work in March— after Dr. Shrestha, D.C. placed him on limited-duty status on February 16 through April 3, 2018—the day before his meniscal surgery. He also offered no explanation for rejecting the second BFOE on April 25, 2018—after Dr. Obermiller, M.D. issued the post-surgery DWC-73 report placing him on limited-duty status, prior to his failure to return to work on or before May 15, 2018— the day Dr. ██████ D.C. also submitted a DWC-73 report indicating Officer Burnett should return to work in a limited capacity.

Officer Burnett also reiterated to IA that he disagreed with his limited-duty designation by Dr. ██████ D.C. on May 15, 2018. Officer Burnett claimed he addressed his concerns about being released to limited-duty with Dr. ██████ D.C. However, Officer Burnett stated Dr. ██████ D.C. did nothing to address his concerns that he was unable to perform in a limited-duty capacity.

Conversely, during Officer Burnett's interview, he contradicted his steadfast assertion to Ms. Adcox and to Commander Johnson that he would not return to work in a "limited capacity until" he attained "MMI." Officer Burnett contended to IA for the first time that he would have returned to work in a limited capacity. He offered the following disingenuous explanation:

"It all boils down to bona fide offers. So, if I was given a bona fide offer, I'd have returned to work and then at that point, I'd have discussed it with my treating doctor, 'Hey, guess what? I don't feel like I can do these - do these job functions that you've listed out in the - in the 73 that you've allowed me to do.'"

Officer Burnett stated the work hours listed on the BFOE matched his typical 10-hour workday schedule, while he claimed the restrictions in the DWC-73 report submitted by Dr. ██████ D.C. restricted him to 8-hour workdays. He disagreed that APD RM had complied with restrictions set forth in the DWC-73 report completed by Dr. ██████ D.C. and that he rejected BFOE based on his belief they were invalid job offers. This was the first time that Officer Burnett offered an explanation why he was not willing to return to work under the limited-duty restrictions in the BFOEs. Before the IA interview, Officer Burnett's sole response was that he disagreed with the limited-duty designation, and he had made no mention of a purported hour restriction.

A review of Part III "*Maximum hours per day work*" of the DW-73 report issued by Dr. [REDACTED] D.C. on May 15, 2017, shows Dr. [REDACTED] D.C. did not restrict Officer Burnett from working more than 8-hours in a day. Part III of the May 15, 2017 report only notated hour restrictions from specific activities, and APD's BFOE adhered to those restrictions.

Moreover, even if Dr. [REDACTED] D.C. restricted Officer Burnett to 8-hour work days, APD RM and his chain of command would have accommodated the restrictions by allowing him to work an 8-hour day, while fully compensating him for 10 hours, in line with the Local Government Code guidelines regarding a line of duty injury. However, Officer Burnett's communicated stance to his chain of command and/or lack of communication with RM precluded that option.

In fact, Officer Burnett's chain of command continuously accommodated Officer Burnett from September 2017 through March 2018, by allowing him to use his accrued vacation and/or sick time in spite of his failure to follow general orders and state workers' compensation requirements. Therefore, when Officer Burnett stated that his failure to return to work "*boils down to invalid bona fide job offers,*" he mischaracterized the efforts APD undertook to assist him.

To further accommodate Officer Burnett's return to work, APD RM sent Officer Burnett a fourth BFOE by certified mail on October 3, 2018, which gave him the opportunity to choose from four/10-hour workdays, or five/8-hour workdays to accommodate his newly asserted complaint. Officer Burnett received the BFOE on October 15, 2018. The deadline to respond to this offer was October 22, 2018. As of today (November 16, 2018) Officer Burnett had not responded to the BFOE, undermining his assertion to IA that he would return to work if he felt the BFOE adequately addressed his needs. Further undermining his assertion that he had every intention to return to work, but for the problem he had with the BFOE, is that Officer Burnett told Commander Johnson and Ms. Adcox that he would not return to work, regardless of what accommodations APD provided him in any capacity.

Compounding matters, near the completion of his initial IA interview, Officer Burnett revealed that he had altered and submitted two DWC-73 reports to APD on December 19, 2017 and January 4, 2018. Thereafter, IA also discovered that Officer Burnett may have altered additional DWC-73 reports on December 5, 2017, December 7, 2017, and December 12, 2017. These discoveries on or after September 5, 2018, prompted an additional IA Complaint by Commander Richard Guajardo for Officer Burnett's failure to comply with all laws/general orders and for dishonesty, by submitting altered report(s) as authentic reports prepared by and submitted by his doctor, Dr. [REDACTED] D.C. A second IA interview was scheduled to discuss the altered DWC-73 reports.

V. Officer Burnett's 2nd IA Interview (October 11, 2018)

IA interviewed Officer Burnett for a second time on October 11, 2018, to address the criminal violation exposed at the end of his September 5, 2018 interview. During the interview, Officer Burnett admitted that he whited out the date on the November 30, 2017 DWC-73 report completed by Dr. [REDACTED] D.C., and he then wrote in different date(s) and submitted the altered forms on separate occasions to APD RM. Officer Burnett conceded Dr. [REDACTED] D.C. did not give him consent to change the dates on the DWC-73 reports.

Officer Burnett's admission reveals that he altered a government document, to wit Workers' Compensation DWC-73 reports, on five different occasions, without his doctor's consent and submitted altered reports on multiple occasions in December 2017 and once in 2018, in violation of Texas Penal Code 37.10 Tampering with Governmental Record.

Moreover, Officer Burnett's act of altering the reports and submitting them to APD was deceptive to the recipient each time he submitted the reports and amounts to at least five distinct acts of dishonesty. Officer Burnett even attempted to mislead IA by claiming he alerted Deborah Kollar, APD RM HR specialist, on one of the five occasions that he altered the report.

VI. Ms. Kollar's IA Interview

Ms. Kollar was subsequently interviewed by IA on October 18, 2018. Ms. Kollar adamantly denied Officer Burnett ever notified her that he was altering any DWC-73 reports. Ms. Kollar stated if anyone had informed her Officer Burnett was altering the date at the top of the DWC-73 reports she would have told Officer Burnett to stop and explained to Officer Burnett he was not to fill out the date and that it was for the doctor to complete the report.

Ms. Kollar stated in her 30 years of experience, this was the first time she thought it was a possibility that someone other than the doctor was writing in the date at the top of a DWC-73 report. Officer Burnett's chain of command and I find Ms. Kollar's testimony to be compelling and credible and we find Officer Burnett's self-serving statement to be incredulous and another violation of the Honesty general order. Moreover, even if Officer Burnett was to be given the benefit of the doubt on the one occasion where he claimed to notify Ms. Kollar, it does not undo the other four occasions where he did not notify her of the alterations.

VII. IA's Efforts to Interview or Contact Dr. [REDACTED] D. C.

Moreover, after initially saying he did not have his doctor's consent, Officer Burnett attempted to advance the notion that he had notified Dr. [REDACTED] D.C. regarding his act of altering the DWC-73 reports. During his second IA interview, Officer Burnett went from telling IA that he specifically notified Dr. [REDACTED] D.C. about the alteration, to insolently dodging investigators questions, to then telling IA he did not specifically tell his doctor, and then reverting back to telling IA that he did notify his doctor.

IA agreed to reach out to Dr. [REDACTED] D.C. at Officer Burnett's behest at the end of his October 11, 2018 interview, only to later be stonewalled by Officer Burnett's directive to Dr. [REDACTED] D.C. that he not communicate with IA. IA assured Officer Burnett and Dr. [REDACTED] D.C. they would not ask any HIPPA protected questions. Nonetheless, investigators efforts to verify Officer Burnett's assertion were futile, as Dr. [REDACTED] D.C. stopped answering/returning their phone calls. Regardless of the credibility of Officer Burnett's representation that he notified Dr. [REDACTED] D.C. of his alterations to the DCW-73 reports, his inconsistent, misleading, and evasive answers on the topic are contrary to the principles of APD's Honesty general order. Moreover, one of his assertions— either that he definitively told Dr. [REDACTED] D.C. or that he did not tell him— cannot both be true.

Conclusion

I find that Officer Burnett should be indefinitely suspended for any one of several reasons. First, the revelation by Officer Burnett on September 5, 2018 that he committed multiple criminal violations alone warrants an indefinite suspension. Officer Burnett's alteration of the reports amounts to five distinct violations of the Texas Penal Code 37.10 Tampering with Governmental Record(s). A single violation of this statute warrants an indefinite suspension.

Second, Officer Burnett conceded he "*should not have*" altered the DWC-73 reports. I concur with that assertion. His multiple acts of altering the forms are also clear violations of the APD's Honesty general order. A singular violation of the Honesty general order also calls for an indefinite suspension. Moreover, the surrounding circumstances/statements, including but not limited Officer Burnett's statements to IA regarding Dr. [REDACTED] D.C. and Ms. Kollar's knowledge, are also distinct violations of the Honesty general order, and independently warrant an indefinite suspension. Any of his dishonest statements and/or acts amount to Brady material and compromise him as a future witness.

Third, any one of Officer Burnett's repeated decisions to not report to work in a limited-duty capacity also independently warrants an indefinite suspension.¹ Officer Burnett's chain of command, RM, and HR all exercised extreme patience in the handling of Officer Burnett's situation and ultimately relied on the decisions of three different doctors, including Officer Burnett's own doctor before holding him accountable for his apathy to APD general orders and state law.

While I empathize with his medical condition, Officer Burnett was obligated to follow general orders and state law regarding the submission of complete, unaltered, accurate, and timely medical documentation during the course of this case. However, he did not meet his duty and obligations after being repeatedly counseled and ordered to do so. Officer Burnett leaves me with no choice but to indefinitely suspend him, and I accept the chain of command's unanimous recommendation to indefinitely suspend him for any one of the independent and/or collective reasons contained within this memorandum.

➤ **Austin Police Department Policy 110.4.4: Organizational Structure and Responsibility: Insubordination**

110.4.4 Insubordination

Employees will not be insubordinate. The willful disobedience of, or deliberate refusal to obey any lawful order of a supervisor is insubordination. Defying the authority of any supervisor by obvious disrespect, arrogant or disrespectful conduct,

¹ While some of Officer Burnett's failure(s) to report to work and/or his failure(s) to provide required documentation are outside the 180-day window for suspension purposes, it is relevant because it shows a pattern of behavior on the part of Officer Burnett, rather than an isolated incident. The basis for this suspension, however, is for any number of reasons, including his failure to provide required documentation and/or report to work after Dr. [REDACTED], D.C., May 15, 2018 DWC-73 report, the dishonest statements to IA during this investigation, and/or the criminal conduct discovered during the 180-day window for suspension purposes.

ridicule, or challenge to orders issued is considered insubordination whether done in or out of the supervisor's presence.

➤ **Austin Police Department Policy 900.1.1: General Conduct and Responsibilities: Responsibility to Know and Comply**

900.1.1 Responsibility to Know and Comply

The rules of conduct set forth in this policy do not serve as an all-inclusive list of requirements, limitations, or prohibitions on employee conduct and activities; employees are required to know and comply with all Department policies, procedures, and written directives.

- (a) Employees will maintain a working knowledge and comply with the laws, ordinances, statutes, regulations, and APD written directives which pertain to their assigned duties.
- (b) Employees who do not understand their assigned duties or responsibilities will read the relevant directives and guidelines, and will consult their immediate supervisor for clarification and explanation.
- (c) A lack of knowledge of an APD written directive is not a defense to disciplinary action.

To Wit:

§ 37.10. TAMPERING WITH GOVERNMENTAL RECORD.

- (a) A person commits an offense if he:
 - (1) knowingly makes a false entry in, or false alteration of, a governmental record;
 - (2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record;
 - (5) makes, presents, or uses a governmental record with knowledge of its falsity;
- (c)(1) Except as provided by Subdivisions (2), (3), and (4) and by Subsection an offense under this section is a Class A misdemeanor unless the actor's intent is to defraud or harm another, in which event the offense is a state jail felony.

➤ **Austin Police Department Policy 900.3.1: General Conduct and Responsibilities: Honesty**

900.3.1 Honesty

Honesty is of the utmost importance in the police profession. Employees are expected to be truthful at all times in the performance of their duties.

- (a) Employees will speak the truth at all times and reflect the truth in all reports and written communications. Any statement or omission of pertinent or material information which intentionally misrepresents facts or misleads others through an official statement will be considered a false official statement. The following are examples of an "official statement":
 - 1. Documents prepared by an officer in connection with their official duties, including but not limited to incident reports or supplements, sworn affidavits, and citations.
 - 2. Verbal or written statements made by an officer in connection with their official duties to:
 - (a) An investigator conducting an administrative or criminal investigation of the officer or another person's conduct.
 - (b) A supervisor conducting an inquiry into the officer's use of force.
 - (c) A fact finder in an administrative, civil, or criminal proceeding in which the officer testifies.
- (c) Employees will not attempt to conceal, divert, or mitigate their true culpability in a situation, nor will they engage in efforts to thwart, influence, or interfere with an internal or criminal investigation.

➤ **Austin Police Department Policy 955.2(a): General Conduct and Responsibilities: General Attendance Guidelines**

955.2(a) General Attendance Guidelines

- (a) Employees will not be absent from work without prior approval from an immediate supervisor.
 - 1. Unless a different notification is required by a Unit SOP, employees have the responsibility of notifying an immediate supervisor at least one (1) hour prior to the scheduled work start time if they are going to be absent.
 - 2. Employees who fail to report to work at the assigned place and time, or who leave work or an assignment without proper authorization will be subject to disciplinary action.

➤ **Austin Police Department Policy 956.5.1(c): On-Duty Injury and Illness : Employee Responsibilities While on Injury Leave**

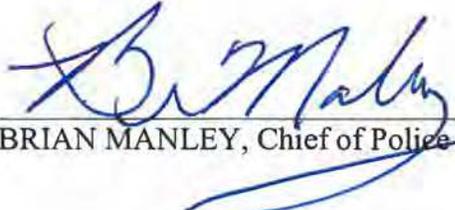
956.5.1(c) Employee Responsibilities While on Injury Leave

All employees placed on injury leave for a compensable injury or illness shall adhere to the following guidelines:

- (c) Employees shall obtain a copy of the completed Texas Workers' Compensation Work Status Report (DWC-73) for each doctor appointment and submit it to the APD Workers' Compensation Office within 24 hours of an appointment.
 - 1. It is the employee's responsibility to ensure each DWC-73 is received by the APD Workers' Compensation Office.
 - 2. Completed forms can be scanned and emailed to "APD Workers' Compensation" or faxed directly to the Workers' Compensation Office (974-6647).
 - 3. No employee shall return to work or change their duty status until the DWC-73 form has been received by the APD Workers' Compensation Office indicating the employee can return to work.

By copy of this memo, Officer Burnett is hereby advised of this indefinite 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 Burnett is hereby advised that such section provides for an appeal to an independent third party hearing examiner. 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.


BRIAN MANLEY, Chief of Police

11-16-18
Date

TO WHOM IT MAY CONCERN:

I hereby acknowledge receipt of the above and foregoing memorandum of indefinite suspension and I have been advised that if I desire to appeal that I have ten (10) calendar 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.

 # 5887

Police Officer Gregory Burnett #5887

11/16/2018

Date