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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, Interim Chief of Police

DATE: April 17, 2017

SUBJECT: Indefinite Suspension of Police Officer Michael Cuellar #7059
Internal Affairs Control Numbers 2016-1185

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 Michael Cuellar #7059 from duty as a police officer for the City of Austin, Texas, effective April 17, 2017.

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

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

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

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

On October 25, 2016, Officer Michael Cuellar arrived for his 5:45 a.m. to 3:45 p.m. shift at the East Substation at 5:34 a.m. After show up, Officer Cuellar drove a patrol vehicle to Travis County Central Booking to perform an Intoxilyzer Operator (IO) practice test on himself, a requirement for maintaining his certification. The test results indicated Officer Cuellar's blood alcohol concentration (BAC) was 0.064/0.065g/210L. Officer Cuellar then drove back to the substation and reported the results to his supervisor, Sergeant Steve Urias. Sergeant Urias then ordered Officer Cuellar to remain out of service for a period of time, until he was no longer under the influence.

The BAC results were also discovered by the Texas Department of Public Safety and brought to the attention of Austin Police Department (APD) Lieutenant Blake Johnson on October 28, 2016, prompting an internal investigation. During the investigation, Officer Cuellar advised internal investigators that he consumed "about three glasses" of 80-proof vodka on the evening of October 24, 2016. He estimated each drink contained 6 or 7 ounces. Officer Cuellar indicated he then consumed two glasses of wine, estimating his last drink was at 10:15 p.m. Officer Cuellar also indicated that prior to this investigation he regularly consumed alcoholic beverages in a similar quantity four nights a week.

Thereafter, Officer Cuellar advised he drove himself to work in his own personal vehicle, leaving his home the next morning sometime between 5:00 and 5:15 a.m. on October 25, 2016. Officer Cuellar confirmed he later drove a patrol vehicle to Travis County Central Booking to perform the Intoxilizer Operator practice tests. Officer Cuellar also advised that upon starting the Intoxilizer machine he immediately hesitated and questioned whether he was "okay to take the test." Nonetheless, he took one test consisting of two samples at 7:31 a.m. and 7:34 a.m., generating the 0.064/0.065g/210L results. Officer Cuellar advised investigators he had no reason to doubt the accuracy of the results.

Internal Affairs also spoke with a Scientific Director with the Texas Department of Public Safety to determine Officer Cuellar's elimination rate. The Scientific Director advised Officer Cuellar's approximate alcohol concentration at 5:30 a.m. on October 25, 2016 was "between 0.084 to 0.124g/210L." Officer Cuellar's own estimates of the alcohol elimination rate, which he extrapolated from his training and experience, suggest he would have been at approximately 0.104g/210L at 5:30 a.m. Moreover, all objectively reasonable conclusions agree his blood alcohol concentration rate would have been slightly higher at the time he left his home and more importantly above the per se level of intoxication of 0.08g/210L as defined in section 49.01(2)(b) of the Texas Penal Code.

APD has a well-documented zero tolerance policy regarding Driving While Intoxicated (DWI) that has been a part of every officer's mandatory training. This initial training was published via video on April 9, 2014 and re-published on June 9, 2016. Officer Cuellar successfully viewed and completed the initial zero tolerance training video on or about April 15, 2014 and subsequently successfully viewed and completed the re-published message on or about August 11, 2016. APD also has a correlating written policy manual that mandates an indefinite suspension for first time administrative DWI offenders.

Therefore, Officer Cuellar's singular act of driving to work while above the legal limit of .08g/210L alone warrants an indefinite suspension. Reporting to work while above the legal limit also leaves me with no choice but to indefinitely suspend him, particularly when APD policy mandates an alcohol-free workplace. Compounding matters, Officer Cuellar was either over the legal limit or at the very least under the influence of an alcoholic beverage as he continued working in APD uniform and then drove an APD patrol vehicle exposing the department and the City of Austin to inordinate liability. Of course, Officer Cuellar also endangered himself and the public by driving while intoxicated and/or under the influence and by working as a uniformed law enforcement officer, particularly should he have been involved in a collision or critical incident.

Officer Cuellar's subsequent decision to drive the APD patrol vehicle back to the East substation after viewing the 0.064/0.065g/210L results was also unjustifiable and inexplicable. Officer Cuellar knew at that point in time he was at the very least under the influence of an alcoholic beverage, and rather than notify a supervisor via telephone, he again endangered himself and the public that morning by driving an APD patrol vehicle, exposing the APD and the City of Austin to additional liability, as stated above.

By these actions Officer Cuellar has brought significant discredit to the APD and his actions warrant he be indefinitely suspended.

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

➤ **Austin Police Department 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:

Texas Penal Code Section 49.04: Driving While Intoxicated

- (a) A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.
- (b) Except as provided by Subsections (c) and (d) and Section 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.

Chapter 49. Intoxication and Alcoholic Beverage Offenses

Sec. 49.01. DEFINITIONS. In this chapter:

- (1) "Alcohol concentration" means the number of grams of alcohol per:
 - (A) 210 liters of breath;
 - (B) 100 milliliters of blood; or
 - (C) 67 milliliters of urine.
- (2) "Intoxicated" means:
 - (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or
 - (B) having an alcohol concentration of 0.08 or more.

➤ **Austin Police Department Policy 900.3.2: General Conduct and Responsibilities: Acts Bringing Discredit Upon the Department**

900.3.2 Acts Bringing Discredit Upon the Department

Since the conduct of personnel both on-duty or off-duty may reflect directly upon the Department, employees must conduct themselves at all times in a manner which does not bring reproach, discredit, or embarrassment to the Department or to the City.

- (a) Employees will not commit any act which tends to destroy public confidence in, and respect for, the Department or which is prejudicial to the good order, efficiency, or discipline of the Department.


➤ **Austin Police Department Policy 916.2(a)(1): Drug and Alcohol Free Workplace: General Guidelines**

916.2(a)(1) General Guidelines

- (a) This policy specifically prohibits employees from:
1. Reporting to work under the influence of any drug or alcoholic beverage.

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


BRIAN MANLEY, Interim Chief of Police

4.17.17

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.

Michael Cuellar 7059
Police Officer Michael Cuellar #7059

4/17/2017
Date