

BEFORE THE POLICE BOARD OF THE CITY OF CHICAGO

IN THE MATTER OF CHARGES FILED AGAINST)
POLICE OFFICER KEVIN D. SMITH,) **No. 15 PB 2883**
STAR No. 10884, DEPARTMENT OF POLICE,)
CITY OF CHICAGO,)
) **(CR No. 1065787)**
RESPONDENT.)

FINDINGS AND DECISION

On April 22, 2015, the Superintendent of Police filed with the Police Board of the City of Chicago charges against Police Officer Kevin D. Smith, Star No. 10884 (hereinafter sometimes referred to as “Respondent”), recommending that the Respondent be discharged from the Chicago Police Department for violating the following Rules of Conduct:

- Rule 1: Violation of any law or ordinance.
- Rule 2: Any action or conduct which impedes the Department’s efforts to achieve its policy and goals or brings discredit upon the Department.
- Rule 14: Making a false report, written or oral.
- Rule 15: Intoxication on or off duty.

The Police Board caused a hearing on these charges against the Respondent to be had before Police Board Hearing Officer Thomas E. Johnson on September 15, 2015.

Following the hearing, the members of the Police Board read and reviewed the record of the proceedings and viewed the video-recording of the testimony of the witnesses. Hearing Officer Johnson made an oral report to and conferred with the Police Board before it rendered its findings and decision.

POLICE BOARD FINDINGS

The Police Board of the City of Chicago, as a result of its hearing on the charges, finds and determines that:

1. The Respondent was at all times mentioned herein employed as a police officer by the Department of Police of the City of Chicago.

2. The written charges, and a Notice stating when and where a hearing on the charges was to be held, were personally served upon the Respondent more than five (5) days prior to the hearing on the charges.

3. Throughout the hearing on the charges the Respondent appeared in person and was represented by legal counsel.

4. The Respondent objected to the admission of Superintendent Exhibit No. 9, the results of the breathalyzer testing done on October 29, 2013, showing that Officer Smith had a blood alcohol concentration of .107. While the Respondent initially made a number of objections to the admissibility of this exhibit, in post-hearing briefing he narrowed his challenge to the argument that the breathalyzer machine used by Sergeant Pettis of the Chicago Police Department's Bureau of Internal Affairs was not working properly and this is required by *People v Eagletail*, 2014 IL App (1st) 130252 (2014), which governs DUI prosecutions. The Board is not bound by *Eagletail* or the rules that govern criminal prosecutions for driving under the influence. In any event, there is no proof here that the breathalyzer machine produced an incorrect result in terms of Officer Smith's blood alcohol concentration. It is true that the date of the test appeared as October 29, 2003, instead of October 29, 2013. Sergeant Pettis explained that if a date discrepancy appears on the machine, he can negate it by typing in a "No" command when it appears. If he fails to do so, as may have occurred here, there is no proof that the blood alcohol concentration results are

inaccurate, or that the machine was otherwise not working properly. All of the other objections to Superintendent Exhibit No. 9, originally articulated by Respondent at trial, are waived, as he did not raise them or otherwise argue them when afforded the opportunity to do so in the briefs the parties filed post-hearing. For these reasons, Superintendent Exhibit No. 9 is admitted.

5. The Respondent, Police Officer Kevin D. Smith, Star No. 10884, charged herein, is **guilty** of violating, to wit:

Rule 1: Violation of any law or ordinance,

in that the Superintendent proved by a preponderance of the evidence the following charge:

On or about October 29, 2013, at approximately 1330 hours at a Walmart retail store located at or near 1100 Fifth Avenue in Hammond, Indiana, Police Officer Kevin D. Smith, while off-duty, was in a public place or a place of public resort in a state of intoxication caused by his use of alcohol, and he breached the peace or was in imminent danger of breaching the peace and/or he harassed, annoyed, and/or alarmed another person, in violation of Indiana Code, IC 7.1-5-1-3, thereby violating any law or ordinance.

The Board finds that the Superintendent has established that Officer Smith was intoxicated on October 29, 2013, while at the Hammond, Indiana, Walmart store, in that Sergeant Pettis administered a breathalyzer test approximately five hours after Officer Smith was detained at the store, and Officer Smith then had a .107 blood alcohol concentration. The Board notes that during this five-hour period, Officer Smith was in the custody of Walmart security staff, the Hammond police and/or the Chicago Police Department's Bureau of Internal Affairs, and so was not drinking during this five-hour period. In addition, the Board credits the testimony of Walmart asset protection employee Ben Davis, who found that Officer Smith smelled of alcohol and had fairly blood shot eyes while at the store, and the testimony of Hammond Police Officer Sean Garrison, who testified that Officer Smith smelled like he had been drinking, and appeared with eyes that

were a little red and watery. The breathalyzer results and the observations of Mr. Davis and Officer Garrison are corroborated by Officer Smith's admission to Sergeant Pettis that he had three glasses of Merlot wine in the half hour before 1:00 pm, shortly before leaving for the Walmart store.

As more fully set out below, the Board finds that Officer Smith then accompanied and aided a retail thief in an attempt to steal electronic merchandise from the Walmart store, which also resulted in a chase after the thief exited the front door of the Walmart. This evidence is more than sufficient to establish that Officer Smith breached the peace while intoxicated, in violation of the Indiana statute.

6. The Respondent, Police Officer Kevin D. Smith, Star No. 10884, charged herein, is **guilty** of violating, to wit:

Rule 2: Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department,

in that the Superintendent proved by a preponderance of the evidence the following charge:

Count I: On or about October 29, 2013, at a Walmart retail store located at or near 1100 Fifth Avenue in Hammond, Indiana, and/or at the Hammond Police Department, Police Officer Kevin D. Smith, while off-duty, was intoxicated and/or had a Breath Alcohol Content of .107, thereby impeding the Department's efforts to achieve its policy and goals and/or bringing discredit upon the Department.

See the findings set forth in paragraph no. 5 above, which are incorporated here by reference. For these reasons, the record establishes by a preponderance of the evidence that Officer Smith violated the Rule set forth in this paragraph no. 6.

7. The Respondent, Police Officer Kevin D. Smith, Star No. 10884, charged herein, is **guilty** of violating, to wit:

Rule 2: Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department,

in that the Superintendent proved by a preponderance of the evidence the following charge:

Count II: On or about October 29, 2013, at approximately 1330 hours at a Walmart retail store located at or near 1100 Fifth Avenue in Hammond, Indiana, Police Officer Kevin D. Smith accompanied and/or aided an unknown individual by pulling a shopping cart containing approximately three televisions and/or a car stereo to the garden section of the Walmart retail store, where the unknown individual removed the alarm sensors from the merchandise in Police Officer Kevin D. Smith's presence, and/or accompanied and/or aided an unknown individual who appeared to be attempting to commit retail theft of approximately three televisions and/or a car stereo, thereby impeding the Department's efforts to achieve its policy and goals or bringing discredit upon the Department.

While Officer Smith contends that he did not know that the unknown thief was attempting to steal electronic equipment from the Walmart store, and was merely following him around the store so that the thief (dressed as a Walmart sales associate) could show him where certain televisions were on sale, the Board does not credit Officer Smith's testimony. Rather, the Board credits the video surveillance of Officer Smith, as well as the testimony of Walmart asset protection employee Ben Davis.

The video surveillance recordings demonstrate conduct by Officer Smith that is inconsistent with his claim of innocence. After arriving at the Walmart in search of a Wii system and a small television priced around \$150, Officer Smith went to the electronics department of the store. A legitimate Walmart employee retrieved a Wii system but Officer Smith did not purchase the item he has come to the store to buy. While it may be that Officer Smith wanted to ring up both of his items at once, his subsequent video-recorded actions significantly undermine his testimony. First, Officer Smith permitted the thief to place three televisions in Smith's shopping cart. Officer Smith testified that the thief told him the televisions were for another customer, but if that is the case, there is no reason for him to place the televisions in Officer Smith's cart, as opposed to the

shopping cart the thief was already controlling. Second, Officer Smith testified that he was in search of a television that would cost about \$150. We know from Superintendent Exhibit No. 6, the receipt printed at Walmart showing the value of the merchandise the thief tried to steal, that two of the televisions in Smith's cart were priced at \$158 each. As Officer Smith now had the second of the items he sought—a television priced around \$150—there was no need for him to go in search of other televisions. Third, even if we assume that Officer Smith felt there might be even less-expensive televisions in some other part of the store, the video shows him going with the thief to the store's garden center, which at the time was a relatively secluded area without other customers, where the store's video system did not capture every area. Almost nine minutes passed since Officer Smith first met the thief. The Board finds it very unlikely that Officer Smith was still merely following the thief to the televisions on sale. Indeed, the conduct of Officer Smith and the thief was suspicious enough to alert a Walmart supervisor, who contacted Walmart asset protection employee Ben Davis. Fourth, and most importantly, it is undisputed that each of the pieces of electronics in Officer Smith's cart was protected with "spider wire," which includes an electronic alarm that sounds when cut. When the spider wire is cut, the alarm emits a loud chirping noise for several minutes. It is also undisputed that spider wire was later recovered by Walmart staff in a grill in the garden center. While Officer Smith denies seeing the thief cut the spider wire, he is more equivocal about whether he heard the alarm, testifying: "I do not recall hearing it. I don't recall hearing that. It could have went off. I wasn't—I didn't know what it was or I wasn't really concerned. It wasn't of my concern, I don't think." (Transcript, p. 229.)

The Board finds this testimony incredible. The Board heard a spider wire alarm as part of the Superintendent's case. The sound is loud and unmistakably an alarm. Walmart asset protection employee Ben Davis credibly testified that he heard a similar alarm from outside the garden center.

Notably, while in the garden center, the thief can be seen on the video going to a machine that looks like a grill, opening and then closing the lid. Davis also testified that spider alarms were later found inside a grill in the garden center. Certainly, a trained police officer like Officer Smith should have recognized the same noise as an alarm. The Board finds that Officer Smith was in close enough proximity to the thief that he saw the thief cut the spider wire off the electronics at issue, and certainly heard the alarm go off. Nonetheless, Officer Smith did not report what was going on to anyone, took no action with respect to the thief, but instead thereafter accompanied the thief with the electronic equipment to the front of the store, in an effort to walk it out of the store. At this juncture, the thief and Officer Smith were using only Officer Smith's shopping cart, and any suggestion that the thief had a purpose in mind other than to steal the equipment was then long gone. Officer Smith accompanied the thief through the Walmart store for more than thirteen minutes in total. Few legitimate customers would have had such patience with the long delay to get service assistance on a specific item, particularly when it entailed such a frolic and detour. There is no indication the thief was showing Officer Smith the location of any televisions on sale. Indeed, had they not been intercepted by Walmart asset protection staff, the thief and Officer Smith clearly would have exited the store with the stolen merchandise. Officer Smith was aiding, as well as accompanying, the thief, in an effort to steal \$876.33 in merchandise from Walmart.

8. The Respondent, Police Officer Kevin D. Smith, Star No. 10884, charged herein, is **guilty** of violating, to wit:

Rule 2: Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department,

in that the Superintendent proved by a preponderance of the evidence the following charge:

Count III: On or about February 27, 2014, Police Officer Kevin D. Smith made one or more of the following false statements to Sergeant Wilfredo Torres Jr. of the Chicago Police Department, Bureau of Internal Affairs, regarding the events of October 29, 2013, and/or the unknown individual who removed alarm sensors from merchandise at a Walmart retail store: I would have arrested the individual myself had I known what he was up to, or words to that effect; and/or no actions led me to believe that I should arrest him, or words to that effect; and/or I was not aware of what he was ultimately doing, or words to that effect; which contradict the statements Officer Kevin D. Smith made to Mr. Benjamin Davis, Walmart Asset Protection Associate, on or about October 29, 2013, when Police Officer Kevin D. Smith stated, “you’ve got the wrong guy. I’m here to stop him but you didn’t give me a chance,” or words to that effect, and or the statements Officer Kevin D. Smith made to Police Officer Sean M. Garrison of the Hammond Police Department on or about October 29, 2013, when Police Officer Kevin D. Smith stated that he intended to arrest the individual, but that he could not find anyone to alert before they reached the door, or words to that effect, thereby impeding the Department’s efforts to achieve its policy and goals and/or bringing discredit upon the Department.

Once he was detained, Officer Smith told Walmart asset protection employee Ben Davis that he had the wrong guy and that, as a police officer, he was going to apprehend the thief. While Officer Smith later denied making these statements when he was interviewed by the Bureau of Internal Affairs, the Board credits the testimony of Ben Davis, who testified consistently and convincingly on this point. Officer Smith’s credibility about what was said to Mr. Davis is seriously undermined by his lack of credibility in recounting what he was doing with the thief, as he accompanied him for over thirteen minutes through the store.

Officer Smith also told responding Hammond Police Officer Garrison that he was about to apprehend the thief but that he could not find anyone to tell about the thief’s activities. The Board finds Sergeant Garrison’s testimony unimpeached and credible on this point. Officer Smith’s contention that he never said this to Sergeant Garrison is not believable. As such, the Board finds that Officer Smith, during his formal interview with the Bureau of Internal Affairs, made intentional false statements when recounting what he said to Mr. Davis or Sergeant Garrison, which was material to the incident under investigation.

9. The Respondent, Police Officer Kevin D. Smith, Star No. 10884, charged herein, is **guilty** of violating, to wit:

Rule 14: Making a false report, written or oral,

in that the Superintendent proved by a preponderance of the evidence the following charge:

On or about February 27, 2014, Police Officer Kevin D. Smith made one or more of the following false statements to Sergeant Wilfredo Torres Jr. of the Chicago Police Department, Bureau of Internal Affairs, regarding the events of October 29, 2013, and/or the unknown individual who removed alarm sensors from merchandise at a Walmart retail store: I would have arrested the individual myself had I known what he was up to, or words to that effect; and/or no actions led me to believe that I should arrest him, or words to that effect; and/or I was not aware of what he was ultimately doing, or words to that effect; which contradict the statements Officer Kevin D. Smith made to Mr. Benjamin Davis, Walmart Asset Protection Associate, on or about October 29, 2013, when Police Officer Kevin D. Smith stated, “you’ve got the wrong guy. I’m here to stop him but you didn’t give me a chance,” or words to that effect, and or the statements Officer Kevin D. Smith made to Police Officer Sean M. Garrison of the Hammond Police Department on or about October 29, 2013, when Police Officer Kevin D. Smith stated that he intended to arrest the individual, but that he could not find anyone to alert before they reached the door, or words to that effect, thereby making a false report, written or oral.

See the findings set forth in paragraph no. 8 above, which are incorporated here by reference. For these reasons, the record establishes by a preponderance of the evidence that Officer Smith violated the Rule set forth in this paragraph no. 9.

10. The Respondent, Police Officer Kevin D. Smith, Star No. 10884, charged herein, is **guilty** of violating, to wit:

Rule 15: Intoxication on or off duty,

in that the Superintendent proved by a preponderance of the evidence the following charge:

On or about October 29, 2013, at a Walmart retail store located at or near 1100 Fifth Avenue in Hammond, Indiana, and/or at the Hammond Police Department, Police Officer Kevin D. Smith, while off-duty, was intoxicated and/or had a Breath Alcohol Content of .107, thereby being intoxicated on or off duty.

See the findings set forth in paragraph no. 5 above, which are incorporated here by reference. For these reasons, the record establishes by a preponderance of the evidence that Officer Smith violated the Rule set forth in this paragraph no. 10.

11. The Police Board has considered the facts and circumstances of the Respondent's conduct, and the evidence presented in defense and mitigation.

The Police Board determines that the Respondent must be discharged from his position due to the serious nature of the conduct of which it has found him guilty. Separate and apart from the rule violations relating to being intoxicated, the Board finds that the Respondent's assistance in the attempted shoplifting of three televisions and a car stereo and in making multiple intentional false statements warrants his discharge. The Respondent knowingly accompanied and aided an individual in attempting to commit an act of retail theft, and then Respondent intentionally made several false official statements in an effort to cover up Respondent's role in the misconduct. The Respondent thereby exhibited a significant lack of integrity, honesty, and trustworthiness, and this misconduct, by itself, is incompatible with continued service as a police officer. Permitting the Respondent to remain on the job would undermine public confidence in the honesty and integrity of the police force.

The Respondent offered evidence in mitigation that the Board has considered. A lieutenant who supervised the Respondent in the Police Department's alternate response section testified positively about the Respondent's job performance. A sergeant testified that he is a long-time friend of the Respondent and that he is a person of good character. In addition, the Respondent has a complimentary history of 31 total awards, including one Life Saving Award, six Department

Commendations, and ten Honorable Mentions.¹

However, the Respondent's accomplishments as a police officer and these positive evaluations of him do not outweigh the seriousness of his misconduct. The Board finds that the Respondent's conduct is sufficiently serious to constitute a substantial shortcoming that renders his continuance in his office detrimental to the discipline and efficiency of the service of the Chicago Police Department, and is something that the law recognizes as good cause for him to no longer occupy his office.

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¹ The Respondent's disciplinary history was the subject of a dispute between the parties. The Board found the existence of any prior suspension to be immaterial for purposes of determining the penalty in this case, did not consider it, and therefore found it unnecessary to resolve the dispute regarding the disciplinary history.

POLICE BOARD DECISION

The Police Board of the City of Chicago, having read and reviewed the record of proceedings in this case, having viewed the video-recording of the testimony of the witnesses, having received the oral report of the Hearing Officer, and having conferred with the Hearing Officer on the credibility of the witnesses and the evidence, hereby adopts the findings set forth herein by the following votes:

By votes of 9 in favor (Lori E. Lightfoot, Ghian Foreman, Melissa M. Ballate, William F. Conlon, Michael Eaddy, Rita A. Fry, John H. Simpson, Rhoda D. Sweeney, and Claudia B. Valenzuela) to 0 opposed, the Board finds the Respondent **guilty** of violating Rule 1, Rule 2, Rule 14, and Rule 15.

As a result of the foregoing, the Board, by a vote of 9 in favor (Lightfoot, Foreman, Ballate, Conlon, Eaddy, Fry, Simpson, Sweeney, and Valenzuela) to 0 opposed, hereby determines that cause exists for discharging the Respondent from his position as a police officer with the Department of Police, and from the services of the City of Chicago.

NOW THEREFORE, IT IS HEREBY ORDERED that the Respondent, Police Officer Kevin D. Smith, Star No. 10884, as a result of having been found **guilty** of all charges in Police Board Case No. 15 PB 2883, be and hereby is **discharged** from his position as a police officer with the Department of Police, and from the services of the City of Chicago.

This disciplinary action is adopted and entered by a majority of the members of the Police Board: Lori E. Lightfoot, Ghian Foreman, Melissa M. Ballate, William F. Conlon, Michael Eaddy, Rita A. Fry, John H. Simpson, Rhoda D. Sweeney, and Claudia B. Valenzuela.

DATED AT CHICAGO, COUNTY OF COOK, STATE OF ILLINOIS, THIS 19th DAY OF NOVEMBER, 2015.

Police Board Case No. 15 PB 2883
Police Officer Kevin D. Smith

Attested by:

/s/ LORI E. LIGHTFOOT
President

/s/ MAX A. CAPRONI
Executive Director

DISSENT

The following members of the Police Board hereby dissent from the Findings and Decision of the majority of the Board.

[None]

RECEIVED A COPY OF

THESE FINDINGS AND DECISION

THIS ____ DAY OF _____, 2015.

GARRY F. McCARTHY
Superintendent of Police