

# **PERSONNEL BOARD**

## **July 18, 2013**

### **MEETING**

Meeting was held Thursday, July 18, 2013, City Council Chambers, County-City Building, Lincoln, Nebraska.

Members present: Ruth Jones, Ed Wimes, Pat Borer, Maggie Stine. Personnel Department resource staff attending: Karen Eurich.

The meeting was opened at 1:30 p.m. by Chair Ruth Jones.

It was moved by Maggie Stine and seconded by Ed Wimes to approve the minutes of the March 21, 2013 meeting. Voting yes: Ruth Jones, Maggie Stine, Ed Wimes. Abstaining: Pat Borer.

It was moved by Pat Borer and seconded by Ruth Jones to approve the minutes of the June 20, 2013 meeting. Voting yes: Ruth Jones, Pat Borer, Ed Wimes. Abstaining: Maggie Stine.

Agenda Item 1 was the request to revise 3028–Urban Search and Rescue Specialist-C23. Nicole Gross of the Personnel Department explained this class is located in the Fire Department, and the revisions are at their request. When the class was created, the main duties included training. The duties have changed over time, and they are removing the training duties and adding cache management duties instead. Following discussion, it was moved by Pat Borer, and seconded by Ed Wimes to approve the revision as presented. Motion unanimously carried by roll call vote.

Agenda Item 2 was the request for ordinance reflecting a pay increase of 2% to be effective August 15, 2013 for pay ranges prefixed by ‘E’. Agenda Item 3 was the request for ordinance reflecting a pay increase of 2% to be effective August 15, 2013 for pay ranges prefixed by ‘X’. Doug McDaniel of the Personnel Department explained this was the time of year for the fiscal year pay increases to be approved for the employees who are unrepresented. Following discussion, it was moved by Pat Borer, and seconded by Maggie Stine to approve Agenda Items 2 and 3 as presented. Motion unanimously carried by roll call vote.

Agenda Item 4 was the request for appeal hearing from Tracy Graham - Police Department. Tonya Peters of the City Attorney’s office represented the Police Department. Sean Brennan of Brennan & Nielsen Law Offices represented Tracy Graham. The proceedings were recorded by Amanda Yendra of J.S. Wurm and Associates are on file in that office. There were 36 exhibits offered and accepted by the Board. Tonya Peters objected to Exhibit #32. The Board noted her objection. Tonya Peters requested that all witnesses except Tracy Graham and Chief Jim Peschong be sequestered. Sean Brennan objected to the request. Chair Ruth Jones granted the request. Witnesses called: Martin Fehringer, Mark Domangue, Jim Peschong, Gregory Cody, David Munn, Kenneth Koziol, Teresa Hruza, Tracy Graham. It was moved by Maggie Stine and seconded by Ed Wimes to deny the appeal. Pat Borer asked for clarification from Maggie Stine

**PERSONNEL BOARD**

**July 18, 2013**

**MEETING**

**Page 2**

that her motion was to uphold the termination and therefore the City would prevail. Maggie Stine affirmed his question. Motion unanimously carried by roll call vote.

There being no further business, the meeting adjourned at 9:20 p.m.

The next scheduled meeting is tentatively set for Thursday, August 15, 2013.

Karen Eurich  
Personnel Operations Specialist

PC: Teresa Meier, City Clerk  
John Huff  
Tonya Peters  
Sean Brennan  
Tracy Graham  
Jim Peschong

BEFORE THE CITY OF LINCOLN, NEBRASKA PERSONNEL BOARD

IN THE MATTER OF )  
THE APPEAL OF THE TERMINATION )  
OF TRACY GRAHAM )

**DECISION**

NOW, on the 18<sup>th</sup> day of July, 2013, this matter came before the City of Lincoln Personnel Board (Personnel Board) on the request for an appeal hearing of Tracy Graham (Graham) regarding the termination of her employment with the City of Lincoln's Police Department (City) as a Sergeant. Graham was represented by Sean Brennan, Attorney at Law, and the City was represented by Assistant City Attorney/Police Legal Advisor Tonya Peters.

Evidence was introduced, testimony offered by the City and Graham (the Appellant), exhibits were submitted, oral arguments were heard, and the matter was submitted to the Personnel Board.

Personnel Board member Maggie Stine moved to deny the grievance (appeal) to uphold the City's termination of Graham. Board member Ed Wimes seconded the motion and upon a vote of 4-0, the Board voted to deny the grievance.

In support of its decision, the Board makes the following findings and conclusions:

1. Graham previously worked as a law enforcement officer in the position of Sergeant with the City's Police Department.
2. On January 26, 2013, Officer Michael Wambold was involved in a motor vehicle accident. Per the Police Department's General Orders, Officer Wambold requested a supervisor investigate the motor vehicle accident. Graham, as a supervisor, investigated the motor vehicle accident.
3. While at the scene of the motor vehicle accident, it became apparent to Graham that the other driver, Jared Betten, had consumed alcohol. Graham administered to Betten an alcohol field sobriety test called horizontal gaze nystagmus (HGN), which Graham testified Betten passed. Graham then administered an alcohol preliminary breath test (PBT) to Betten. Prior to administering the PBT,

Graham did not follow proper procedures. Betten's test result was .086 breath alcohol content (BAC). Instead of transporting Betten for a formal breath test, Graham released Betten to a sober third party.

4. Upon returning to the City's main police station, Graham told Duty Captain Danny Reitan that Wambold was in a motor vehicle accident and that the other driver (Betten) had tested over the legal limit for alcohol. The discussion did not address testing mistakes made by Graham at the scene of the accident. As directed by Captain Reitan, Graham notified her captain, Martin Fehringer, of Officer Wambold's motor vehicle accident and that the other driver was a "little intoxicated."

5. In violation of the City's Police Department General Orders, Graham did not complete the State of Nebraska Investigator's Motor Vehicle Accident Report (MVAR) prior to the end of her work shift that began on January 26, 2013 and that ended on the early morning hours of January 27, 2013. Graham did not complete the MVAR during her next shift which began on January 27, 2013 and ended during the early morning hours of January 28, 2013. However during this second work shift, Graham did complete a MVAR regarding a different motor vehicle accident that occurred after Officer Wambold's motor vehicle accident. After being told to complete the MVAR, regarding Officer Wambold's accident, by Captain Fehringer and Sergeant Samuel Santacroce, Graham completed the MVAR during her next work shift that started during the afternoon of January 28, 2013.

6. On the second page of the MVAR, the form requires the investigator (law enforcement) to report if alcohol level was tested. The investigator is to mark a box next to "y" for yes, or "n" for no. Witnesses testified that law enforcement employed by the City's Police Department are trained that when field sobriety tests, preliminary breath tests, or chemical tests are administered, these tests qualify as tests for alcohol level. Additionally, the "Instructions for Completing Investigator's Motor Vehicle Accident Report Forms" (January 2009) produced by the Nebraska Department of Roads provides "[f]or each driver or a pedestrian involved in the accident, indicate whether an alcohol test was given by placing an "X" in the appropriate yes or no box." Graham had been trained to complete the

MVAR and had previously used the instruction manual. On the MVAR, Graham marked an "x" next to "n" (no) alcohol tests were given. There is also a box for the investigator to write the BAC level, Graham left this box blank.

7. On the second page of the MVAR, the form requires the investigator to report if alcohol/drugs are suspected. The investigator is given five numbered options. For each driver, the investigator is required to fill in the appropriate number. The first option is identified as number '1' and states "neither alcohol nor drugs suspected." The second option is identified as number '2' and states "Yes – alcohol suspected." Witnesses testified that law enforcement employed by the City's Police Department are trained to complete this box according to their assessment of the driver's condition, alcohol testing is not required nor does alcohol have to be the suspected cause of the accident. Additionally, the "Instructions for Completing Investigator's Motor Vehicle Accident Report Forms" (January 2009) produced by the Nebraska Department of Roads provides "[f]or each driver in the accident...indicate whether you suspect alcohol or drug use. This entry should be based on your personal assessment of whether alcohol or drugs were used. Positive test results are not required." Graham testified that she had been trained in how to complete the MVAR and had previously used the instruction manual. On the MVAR for both drivers, Graham marked "1" in the box indicating that she didn't suspect either driver of using alcohol or drugs.

8. On February 1, 2013, Officer Wambold reported to Captain Fehringer that the MVAR contained incorrect information. Captain Fehringer also testified that Officer Wambold reported the testing errors made by Graham at the scene of the motor vehicle accident.

9. On February 4, 2013, Captain Fehringer met with Graham to discuss the MVAR. When Graham was asked by Captain Fehringer why she marked that no alcohol testing was given to either driver. Graham indicated that she marked the "no" box because she didn't complete all of the field sobriety tests, so she didn't think it rose the level of alcohol being tested. When Graham was asked by

Captain Fehringer why she marked that alcohol use wasn't suspected by either driver, Captain Fehringer testified that Graham did not provide explanation.

10. On February 8, 2013, Chief of Police James Peschong notified Graham in writing that he ordered Sergeant Mark Domangue of Internal Affairs to conduct a Chief's Investigation.

11. As part of the Chief's Investigation, Sergeant Domangue interviewed several persons, including Graham. Graham told Sergeant Domangue that she was the one to identify the fact that Betten smelled of alcohol and that Betten admitted to drinking previously in the day. Graham indicated that she requested Betten to submit to two alcohol tests, HGN and a PBT. Graham indicated that she did not follow proper procedures in administering the PBT. Graham indicated that she completed the MVAR, and that she marked that she did not test for alcohol because she didn't follow proper testing procedures. Graham further indicated that she marked that alcohol use was not suspected by either driver as she didn't believe that alcohol was the cause of the accident.

12. On March 26, 2013, pursuant to Lincoln Municipal Code 2.76.445, Chief Peschong placed Graham on an investigative suspension without pay for up to thirty (30) days.

13. On April 11, 2013, Graham was notified of a pre-disciplinary hearing to occur on April 18, 2013 and of the alleged violations of the Police Department's General Orders. A pre-disciplinary (due process) hearing occurred on April 18, 2013, and was attended by Graham and her attorney, Sean Brennan. A summary of the Chief's Investigation was provided by Sergeant Domangue. Graham was given an opportunity to ask questions and provide additional evidence.

14. On April 18, 2013, Chief Peschong provided written notice to Graham that she was suspended for fifteen days pending the termination of her employment. She was notified that Chief Peschong determined that she violated the Police Department's General Orders 1930, subsection 11, #3 and #4; 1420, #6, 7, 17 & 25; and 1425, as well as violation of Section 2.76.445(g) and (j) of the Lincoln Municipal Code for her actions occurring on January 26, 2013 and January 28, 2013.

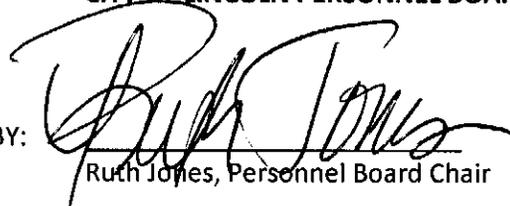
15. Based upon the testimony and evidence presented, the Personnel Board concludes that termination of Graham's employment with the City is the appropriate level of discipline to be imposed in this matter.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Appeal of the termination of the employment of Tracy Graham be and the same is hereby denied.

Dated this sixth day of August 2013.

**CITY OF LINCOLN PERSONNEL BOARD**

BY:

A handwritten signature in black ink, appearing to read "Ruth Jones", written over a horizontal line.

Ruth Jones, Personnel Board Chair