

City of Miami

*City Hall
3500 Pan American Drive
Miami, FL 33133
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Meeting Minutes

Tuesday, January 12, 2010

10:00 AM

Commission Chambers

Civil Service Board

*Miguel M. de la O, Chairperson
William J. Scarola, Chief Examiner
Michael T. Dames, Board Member*

PLEDGE OF ALLEGIANCE

The meeting was called to order at 10:10 a.m. The roll call at the commencement of the meeting was as follows:

Present: Chief Examiner Scarola, Chairperson de la O and Member Dames

Vacant: Member **Vacancy

A. APPROVING THE MINUTES OF:

Regular Meeting of December 15, 2009.

Motion by Chief Examiner Scarola, seconded by Member Dames, to APPROVE.

PASSED by the following vote.

Aye: Chairperson de la O, Dames and Scarola

Vacant: **Vacancy and **Vacancy

B. PERSONNEL MATTERS**C. MILITARY LEAVES OF ABSENCE****D. DISCIPLINARY MATTERS**

- D.1** Copy of a letter from Hector Mirabile, Ph.D., Director, Department of Employee Relations, notifying Arcadio Mestril, Sign Painter, of the "Correction/Reversal of Separation from Employment." (NOTIFICATION)

NOTIFIED

- D.2** Copy of a letter from Chief Kemp, Director, Department of Fire-Rescue, notifying Einar Ojito, Firefighter, of his 48-hour fine, effective January 1, 2010. (NOTIFICATION)

NOTIFIED

- D.3** Copy of a letter from Chief Kemp, Director, Department of Fire-Rescue, notifying Elmore Johnson, Firefighter, of his 80-hour suspension, effective January 5, 2010. (NOTIFICATION)

NOTIFIED

- D.4** Copy of a Judgment from the City Manager concurring with the Board's findings concerning Alice Dunn, Typist Clerk II, relative to her 40-hour suspension, effective September 1, 2008. Ordered and adjudged that the decision of the Chief of Police that she shall serve a 40-hour suspension is hereby modified to a 20-hour suspension. (NOTIFICATION)

NOTIFIED

- D.5** Copy of a Judgment from the City Manager concurring with the Board's

findings concerning Humberto Mijares, Building Inspector III, relative to his 3-day suspension, effective August 27, 2008. Ordered and adjudged that the decision of the Director of the Building Department that he be suspended for three (3) days is hereby reversed. (NOTIFICATION)

NOTIFIED

- D.6** Copy of a Judgment from the City Manager concurring with the Board's findings concerning Silvia Benitez, Communications Operator, relative to her 80-hour suspension, effective February 9, 2009. Ordered and adjudged that the decision of the Chief of Police that she shall serve an 80-hour suspension is hereby modified to a 40-hour suspension. (NOTIFICATION)

NOTIFIED

- D.7** Copy of a Judgment from the City Manager concurring with the Board's findings concerning Teresa Borkowski, Police Sergeant, relative to her 10-hour suspension, effective April 4, 2006. Ordered and adjudged that the decision of the Chief of Police that she shall serve a 10-hour suspension is hereby reversed. (NOTIFICATION)

NOTIFIED

- D.8** Copy of a Judgment from the City Manager concurring with the Board's findings concerning Teresa Borkowski, Police Sergeant, relative to her 10-hour suspension, effective May 24, 2006. Ordered and adjudged that the decision of the Chief of Police that she shall serve a 10-hour suspension is hereby reversed. (NOTIFICATION)

NOTIFIED

- D.9** Copy of a Judgment from the City Manager concurring with the Board's findings concerning Reginald Kinchen, Police Sergeant, relative to his 20-hour forfeiture letter, effective July 27, 2005. Ordered and adjudged that the decision of the Chief of Police that he shall forfeit 20-hours of earned time is hereby affirmed. (NOTIFICATION)

NOTIFIED

E. GENERAL ITEMS

- E.1** Copy of Findings of Fact concerning the appeal hearing of Barbara Shaffner, Police Officer, relative to her 20-hour forfeiture, effective March 3, 2005. (DISCUSSION)

ACA Min stated that he and Attorney Rind submitted proposed findings and he also submitted a second proposed findings incorporating some of Attorney Rind's recommendations which was handed out to Board Members. Referring to the proposed findings prepared by ACA Min, Chairman de la O asked Attorney Rind if she had any objections to the findings.

Attorney Rind responded that she had an objection to finding 3 under the subheading,

FINDINGS OF FACT, page 3 which states, "Appellant appeared at the pre-filing conference on June 15, 2004, BUT DID NOT HAVE WITH HER ALL OF THE REPORTS." (Verbiage in ALL CAPS indicates proposed language to be either stricken or added.) She went on to say that is incorrect and should be stricken because she does not believe her client failed to bring with her all of the appropriate documents.

Following argument by attorneys and discussion by the Board, Chairman de la O stated that the dispute between both attorneys is whether there was a greater universe of reports that existed than what Officer Shaffner had in her possession and there is no dispute that Officer Shaffner brought everything that was in her possession, but it is the department's position that there was a greater universe of documents and it is the employee's position that there was no greater universe because Officer Shaffner had the full universe of documents and she brought them with her. He went on to say that since ACA Min agreed that it was never proven there were more documents as indicated by the State, his suggestion would be to amend findings 3 and 4 as follows:

Finding 3: "Appellant appeared at the pre-file conference on June 15, 2004 with all of the reports in her possession."

Finding 4: "The State Attorney's Office believed there were more reports generated in the case. It was not established at the hearing that there were in fact more reports."

Chairman de la O asked the attorneys if they were in agreement with the amendment to findings 3 and 4. Both attorneys responded in the affirmative.

Chairman de la O asked Attorney Rind if she had an objection to finding 6. Attorney Rind responded in the affirmative. She went on to say that the information is not completely accurate because according to the policy, officers must respond within 10 days of receipt of the tickler as to why the officer failed to appear.

Chairman de la O asked ACA Min if he had an objection to the explanation made by Attorney Rind concerning the policy. ACA Min responded in the negative.

Chairman de la O stated that since there was no objection, finding 6 will read, "The Police Department has a policy that requires officers to explain, within 10 days of receiving the tickler, why the officer failed to appear for the pre-file conference properly prepared."

Chairman de la O asked Attorney Rind if she had any other objections. Attorney Rind responded that findings 7 and 8 appeared to be the same.

ACA Min responded that findings 7 and 8 are different. He went on to say that according to finding 7, the Appellant was notified multiple times that she should obtain her ticklers and according to finding 8 the Appellant received multiple notices requiring her to appear.

Following argument by attorneys and discussion by the Board, Chairman de la O suggested that finding 7 be amended to read, "Appellant was sent notification multiple times that she should obtain her "ticklers" while on duty which required her to explain her absence, by going to the Court Liaison Office." He asked the attorneys if they had an objection to the amendment of finding 7. Both attorneys responded in the negative.

Chairman de la O asked Attorney Rind if she had an objection to findings 9 and 10. Attorney Rind responded in the negative.

Chairman de la O asked Attorney Rind if she had an objection to findings 11 and 12.

Attorney Rind responded in the negative.

Chairman de la O asked Attorney Rind if she had an objection to finding 13. Attorney Rind responded that while she did not have an objection, she did propose language concerning this matter under finding 4 of the proposed findings that she prepared. She went on to say her finding reads, "Officer Shaffner asked her immediate supervisor, Sgt. Monroe, for permission to leave her assigned area during her shift to pick up the tickler "on duty" as instructed. Sgt. Monroe told Officer Shaffner that per the commander, she could not go to court liaison during her shift to pick up the tickler."

Chairman de la O asked ACA Min if he objected to replacing finding 13 with the language proposed by Attorney Rind. ACA Min stated that what he wrote is a shorter version of what Attorney Rind proposed so they both are saying the same thing; therefore, he has no objection.

Following discussion, Chairman de la O stated that finding 13 has been amended as follows: "Officer Shaffner asked her immediate supervisor, Sgt. Monroe, for permission to leave her assigned area during her shift to pick up the tickler "on duty" as instructed. Sgt. Monroe told Officer Shaffner that per the commander, she could not go to court liaison during her shift to pick up the tickler."

Chairman de la O asked the attorneys if they had any other objections concerning the findings of fact. Both attorneys responded in the negative.

Following discussion, the Board entered a motion to APPROVE the proposed findings of fact and conclusion of law as amended which resulted as follows:

Motion by Member Dames, seconded by Chief Examiner Scarola, that this matter be APPROVED. PASSED by the following vote.

Aye: Chairperson de la O, Dames and Scarola

Vacant: **Vacancy and **Vacancy

E.2

Copy of Findings of Fact concerning the appeal hearing of Kenneth McIlwain, Police Officer, relative to his 20-hour forfeiture, effective March 3, 2005. (DISCUSSION)

Member Scarola asked if the approved amendments to the findings of fact in the matter of Officer Shaffner would also apply to the findings of fact in the matter of Officer Kenneth McIlwain. ACA Min responded in the affirmative.

Chairman de la O asked if the Board would be voting on the findings of fact concerning Officer McIlwain's hearing. ACA Min responded that the substance is exactly the same as in Officer Shaffner's case; however, there were differences as to the charges.

Following discussion, the Board entered a motion to APPROVE the findings of fact and conclusions of law as amended which resulted as follows:

Motion by Member Dames, seconded by Chief Examiner Scarola, that this matter be APPROVED. PASSED by the following vote.

Aye: Chairperson de la O, Dames and Scarola

Vacant: **Vacancy and **Vacancy

E.3

Copy of Findings of Fact concerning the grievance hearing on behalf of

Suzanne Bermudez, Administrative Aide I. (DISCUSSION)

ACA Min stated that he had no objections to the changes proposed by Attorney Rind that appear on pages 1, 2, and 3, (paragraphs 3 and 4); however, he did object to paragraph 6 that also appears on page 3 which states, "The Board interprets the seniority provision of Rule 12.1(c) to mean that IN CALCULATING SENIORITY CREDITS, THE CITY MUST FIRST CALCULATE THE TOTAL NUMBER OF SENIORITY CREDITS. THE CITY MUST THEN CALCULATE THE TOTAL SUM OF ALL UNPAID LEAVE TIME TAKEN BY THE EMPLOYEE WHILE EMPLOYED IN THE CLASSIFICATION. THE CITY MAY THEN DEDUCT ONE SENIORITY CREDIT FROM THE TOTAL NUMBER OF SENIORITY CREDITS WHEN THE TOTAL SUM OF UNPAID LEAVE TIME EXCEEDS ONE MONTH OF EMPLOYMENT (OR 172 HOURS); THE CITY MAY DEDUCT TWO SENIORITY CREDITS FROM THE TOTAL NUMBER OF SENIORITY CREDITS WHEN THE TOTAL SUM OF UNPAID LEAVE TIME EXCEEDS TWO MONTHS OF EMPLOYMENT (OR 344 HOURS), AND SO ON." (Verbiage in ALL CAPS indicates proposed language to be added or stricken).

Attorney Rind stated that she obtained the Board's minutes [concerning the discussion about what a full month is according to Rule 12.1(c) and that she understood what Member Dames intended [in calculating seniority] which was to add up all of the time an employee was without pay and if that time equaled a month, one month would be deducted from the employee's seniority credit. She went on to say that she believed Member Dames threw out a number [to represent a month]. ACA Min interjected and stated that what was thrown out by Member Dames was how many days equaled a month. He went on to say that he specifically remembers this discussion because he wanted to be very specific so that the department could treat future employees the same [when it came to calculating seniority in accordance with Rule 12.1(c)]. ACA Min further stated that he believes the Board's definition of a full month was if the hours without pay totalled 28 days that would be considered a full month.

Attorney Rind stated that 28 days times 8 (hours) equals 224 hours. She went on to say that if an employee's hours without pay totalled 0 to 28 days, no credit would be deducted so the problem she has is that Ms. Bermudez's without pay hours (188) totalled 24 days which is less than what the Board defined as a month, but the Board wanted to deduct her one month. Attorney Rind went on to say that the Board could do whatever it chooses with its Rule, but what she did was take 172 hours (4 weeks x 4.3) which captured Ms. Bermudez with a one-month deduction since she had 188 hours without pay. She went on to say the number (that defines a month) can be whatever the Board decides it should be, but the Board must remember that Ms. Bermudez had a total of 188 hours without pay and the Board wanted to deduct her one-month credit.

ACA Min stated that it is not to say that he totally agrees with the proposal submitted by Attorney Rind, but it makes more sense to him than the idea that "28 days" would be the cap (an employee receives credit for a month and any amount above 28 the employee would not receive credit); however, Ms. Bermudez' total hours of without pay totalled less than 28 days yet (according to the Board's approved motion) she would receive a deduction credit of one month.

Member Dames stated that considering the 172 hours used by Attorney Rind, this would equate to 21.5 days (172 hours divided by 8) so he would suggest rounding it up to 22 days which is closer to the number used by Member Scarola as to the number of hours in a month.

ACA Min further stated that he could not remember the number Member Scarola used, but he did remember that Member Scarola proposed using the Federal standard figure for the total use of hours in a month; however, he did not know if the Board wanted to go with that proposal.

Member Scarola stated that the number of 173.3 hours is used in the contracts to define a month.

ACA Min stated that he did not know if the Board wished to use 172 hours or 173.3 hours (to represent a full month of service). Member Dames stated that he agreed with using 173.3 hours in lieu of the 172 hours proposed by the employee.

Member Scarola stated that the Government considers a work year as 2,080 hours (26 pay periods in a year times 80 hours). He went on to say that dividing the 2,080 hours by 12 months equals the number of hours per month which is 173.3 hours.

ACA Min stated that the Board may want to reconsider its motion and adopt using 173.3 hours as the definition for a month as opposed to 28 days that was approved by the Board. He went on to say it was not that the department agrees with the proposal, but respectfully it makes a lot more sense.

Chairman de la O asked if the department was in agreement with the proposed change to paragraph #6. ACA Min responded that he would have no objection if the Board changed its findings because the language that is included in paragraph 6 is not the Board's finding.

Chairman de la O asked what the change would be to paragraph 6. Attorney Rind responded that 172 hours would change to 173.3 hours and 344 hours would change to 346.6 hours. He asked the Board Members if they were in agreement with the change. Member Scarola stated that a response would have to come from Member Dames since he (Scarola) did not agree with the motion in its entirety.

Chairman de la O asked Member Dames if he was in agreement with changing the number of hours that would represent a month from 172 hours to 173.3 hours. Member Dames responded in the affirmative and Member Scarola stated that he was in favor of the change.

Without objection from Board Members, Chairman de la O stated that paragraph 6 as proposed by Attorney Rind and amended by the Board will remain in the findings. He asked the department's attorney if he objected to striking the original paragraph 6 which states, "SENIORITY CREDIT WILL NOT BE AWARDED FOR PERIODS OF UNPAID LEAVE. THE TIME WITHOUT PAY SHOULD BE DEDUCTED AND CREDIT AWARDED FOR THE REMAINDER OF THE EMPLOYEE'S SERVICE." ACA Min responded in the negative.

Chairman de la O asked the department's attorney if he had an objection to the proposed recommendations. ACA Min responded in the negative. He went on to say that he did however have a suggestion he wished to propose to the Board. He stated that he spoke with some Board Members after Ms. Bermudez' hearing and Attorney Rind to amend Rule 12.1(c) since it is unclear as currently written so he did not know if the Board wanted to consider making a recommendation to the City Manager that administration consider working on amendments to the Rule for a presentation for adoption by the City Commission. ACA Min went on to say that he is aware that this suggestion was not something included in the Board's original recommendation but if it is something the Board feels is appropriate, it can be added to the [Findings and Recommendation.]

Chairman de la O asked the Board Members if they wished to make a recommendation to the City Manager or the City Commission reference a change to Rule 12.1(c).

Attorney Rind stated that administration would have to draft an amendment because it cannot be done only in this proceeding. ACA Min responded that it depends how the Board wants to handle the rule change since the Board might want to handle the rule change themselves or ask administration to work on the rule change and bring it back before the Board for consideration. He stated that he knows that concerns were expressed by some of the Board Members that Rule 12.1(c) as written is not clear and is not the most well drafted rule.

Chairman de la O asked who would work on the rule change. ACA Min responded that it would be whomever the Board or the City Manager designates; however, his recommendation would be that the Board include in its recommendations that the City Manager work with administration reference clarifying and amending the Ordinance. He stated at that time, administration can decide who it wants to designate (i.e. Executive Secretary, Employee Relations, Law Department).

Attorney Rind stated that the method proposed by ACA Min in handling a rule change could impact collective bargaining rights with the unions. She went on to say that although she did not know how it could impact the unions, she just knows that it possibly could.

Chairman de la O asked Attorney Rind if she meant the review or the change of the rule would impact bargaining rights. Attorney Rind responded that the change would impact the bargaining rights. Chairman de la O responded that there is no change, but a change could impact a collective bargaining union; however, he would assume that anyone proposing a change would take that into consideration.

Attorney Rind asked if the Board is going to require administration to do something or is the Board going to propose something to administration with regards to an amendment to Rule 12.1(c). Chairman de la O responded that he thinks what ACA Min proposed made sense because the City Manager should work with administration regarding Rule 12.1(c) and review it to see if it could be written clearer, but at that point it is still the Board's rule because the proposal would have to be brought before the Board for approval and also adoption by the City Commission before it can become operative.

Attorney Rind stated that she would ask that a review of the rule be also made in conjunction with the unions.

Chairman de la O stated that the recommendation would be that the City Manager work with administration and the employees' representatives for review to see if there is a way to clarify Rule 12.1(c). He went on to say that he did not participate in Suzanne Bermudez' case but Board Members Scarola and Dames did and they agree that the rule should be looked at, so the recommendation will be added in the findings.

Chairman de la O asked ACA Min if he had any other proposed changes. ACA Min responded in the affirmative and referred the Board to page 2, second paragraph of the findings prepared by Special Counsel Everett in the matter of Suzanne Bermudez which states, "The Grievant and the City stipulated to the admission of exhibits. No witnesses were called in either case in chief and the City asked for guidance from the Board in defining the term "full month" AS USED IN RULE 12.1(c)." He went on to say that he would like to have this language included in the findings.

Chairman de la O asked Attorney Rind if she had an objection to adding the language, "as used in Rule 12.1(c) at the end of the paragraph. Attorney Rind responded in the negative.

Chairman de la O asked Attorney Rind if she had an objection to striking the words,

"testimony" and "evidence" from the fourth paragraph, page 2, and amending the paragraph so that it reads, "The Board, after considering the EXHIBITS ENTERED INTO EVIDENCE and argument of counsel, made the following findings of fact:" Attorney Rind responded that she had no objection.

ACA Min stated that there was no need to discuss paragraph 2, page 2 under Findings of Fact because this paragraph was amended earlier when the Board considered Attorney Rind's proposed findings. He went on to say that he would like to reword paragraph 5 so that it reads, "The City ARGUED that ALTHOUGH its interpretation of "full month of service" WAS REASONABLE, THE RESULT WAS HARSH in the Grievant's case."

Under discussion, Member Dames stated that paragraph 5 should remain as proposed. Chairman de la O responded that the Board Members were leaning towards the proposed language; therefore paragraph 5 will read, "The City ACKNOWLEDGED that its interpretation of "full month of service" CREATED AN ABSURD RESULT in the Grievant's case."

ACA Min referred the Board back to the findings amended by Attorney Rind, page 4, paragraph 2, under RECOMMENDATIONS which states, "Grievant's name should be placed back on the Administrative Aide I register." He went on to say that this paragraph should be stricken since it is already stated in paragraph 1.

Chairman de la O responded that ACA Min has asked that the paragraph be stricken; however, he thinks it is no longer a part of the findings because when he looks at Attorney Rind's version of the findings that the Board was working off of, the first recommendation is "Grievant should be reinstated as an Administrative I." and the second recommendation is "The City should recalculate Grievant's seniority credit and only deduct one credit based on the fact that the employee was without pay for a total of 188.1 hours while employed in the classification."

ACA Min reiterated that the third recommendation should be stricken. Attorney Rind responded that she had no objection.

ACA Min stated that the last suggestion is that a spell check be conducted to ensure that the word "Grievant" is spelled correctly throughout the findings.

Following discussion, the Board entered a motion to APPROVE the findings of fact as amended which resulted as follows;

Motion by Chief Examiner Scarola, seconded by Member Dames, that this matter be APPROVED. PASSED by the following vote.

Aye: Chairperson de la O, Dames and Scarola

Vacant: **Vacancy and **Vacancy

Following the approval of the findings of fact in the case of Suzanne Bermudez, Member Dames stated that employees were laid off pursuant to Rule 12.1(c) so he wanted to know [since the motion was amended as to the definition of a full month of service] would the department need to revisit [the calculation used to determine seniority for employees that were laid off]. ACA Min responded that was the reason he had asked for clarification on what is the definition of a full month because it will affect past and future layoffs; therefore, if the Board made a definition that is different from the interpretation that has been used by the department in the past, it will not affect everyone, but certain ones who were laid off, rolled back, etc.

Attorney Rind stated that Charlie Cox (AFSCME Union President) advised her that there

had not been a layoff of employees in 22 years. ACA Min responded that he knew of one person who says that she was rolled back due to the calculations used by the department but by using the new calculation that is being proposed by the Board, she would not have been affected.

Attorney Rind asked for the name of that employee ACA Min made reference to. ACA Min responded that he would have to get back with Attorney Rind concerning her request for the name of the employee.

DISCUSSED : NO ACTION TAKEN

- E.4** Copy of Findings of Fact concerning the appeal hearing of Clive Vernon, Police Officer, relative to his termination, effective December 1, 2008. (DISCUSSION)

Item deferred from the meeting of December 15, 2009.

ACA Min stated that he did not know if Attorney Guttman-Valdes indicated whether she had an objection to the findings but he did know that she requested a continuance [of a hearing she has scheduled today] due to personal reasons.

The Executive Secretary stated that she would carry the matter over to the Board's next meeting.

DEFERRED TO THE JANUARY 26, 2010 MEETING FOR BOARD CONSIDERATION.

- E.5** Copy of a Memorandum from Pedro G. Hernandez, City Manager, concerning a remedy in the grievance hearing of Miguel Hervis, Police Lieutenant, pursuant to Civil Service Rule 16.2, Complaint by Employee. (NOTIFICATION)

NOTIFIED

- E.6** Copy of a Settlement Agreement between City of Miami and Daniel Rodriguez, Police Officer, concerning the hearing of appeal relative to his 40 hour suspension, effective February 24, 2009 and a Notice of Withdrawal of Appeal hearing. (NOTIFICATION)

NOTIFIED

F. REPORTS

- F.1** The 2009 Annual Board Report to the City Commission. (DISCUSSION)

Motion by Chief Examiner Scarola, seconded by Member Dames, that this matter be APPROVED. PASSED by the following vote.

Aye: Chairperson de la O, Dames and Scarola

Vacant: **Vacancy and **Vacancy

- F.2** The 2009 Annual Report reflecting Board action on Hearings, Administrative Activities, and Outstanding Judgments. (NOTIFICATION)

PRESENTED

F.3 Hearings pending as of January 12, 2010. (NOTIFICATION)

PRESENTED

G. REQUESTS FOR HEARINGS

G.1 Copy of a Request for Grievance Hearing from Osnat K. Rind, Attorney, on behalf of Cynthia Bennett, Payroll Aide, pursuant to Rule 16.2, alleging a violation of Civil Service Rule 8.10(b). (DISCUSSION)

ACA Min stated that the department is asking that this item be deferred to the Board's next meeting because they are attempting to settle the matter. He went on to say that Attorney Rind mentioned that she would not be available on January 26 so he needs to know if she wants to move this item to the first meeting in February. Attorney Rind responded that she would like to have it reset for the January 26 meeting and if she is not available, she would notify the appropriate individuals.

DEFERRED TO THE JANUARY 26, 2010 MEETING FOR BOARD CONSIDERATION, IF NECESSARY.

H. TODAY'S HEARINGS

H.1 Hearing of appeal on behalf of Kate Abia, Police Officer, relative to her termination effective July 21, 2008.

ACA Min stated that this matter has been settled; however, he did not know if the documents were signed.

Chairman de la O asked if the Board should roll this item over to the next meeting in the event it is not settled. Attorney Rind responded in the affirmative.

Chairman de la O instructed the Executive Secretary to roll this matter over to the next meeting (if the settlement agreement is not received).

NO ACTION TAKEN : CASE WILL BE CLOSED UPON RECEIPT OF WRITTEN SETTLEMENT AGREEMENT.

H.2 Hearing of appeal on behalf of Stephon McGill, Police Officer, relative to his 120-hour suspension, effective August 3, 2009.

ACA Min stated that Officer McGill contacted him and advised that he asked for a continuance of his hearing so that he could obtain an attorney.

Chairman de la O asked ACA Min if he had an objection to the continuance. ACA Min responded in the negative.

Following discussion, the Board entered a motion to CONTINUE the hearing of Officer Stephon McGill and charge the continuance to the employee which resulted as follows:

Motion by Chief Examiner Scarola, seconded by Member Dames, that this matter be CONTINUED. PASSED by the following vote.

Aye: Chairperson de la O, Dames and Scarola

Vacant: **Vacancy and **Vacancy

H.3

Grievance Hearing on behalf of Lazaro Cabezas, Telecommunications Technician, pursuant to Civil Service Rule 14.

ACA Min stated that Mr. Cabeza is represented by Attorney Guttman-Valdes and she has asked for a continuance due to personal reasons.

Following discussion, the Board entered a motion to CONTINUE Lazaro Cabeza's hearing and charge the continuance to the employee which resulted as follows:

Motion by Chief Examiner Scarola, seconded by Member Dames, that this matter be CONTINUED. PASSED by the following vote.

Aye: Chairperson de la O, Dames and Scarola

Vacant: **Vacancy and **Vacancy

H.4

Grievance Hearing on behalf of Neal A. Muhammad, Fire Lieutenant, pursuant to Civil Service Rule 4.2, concerning the 2008 Fire Captain's Oral Board Exam.

Leslie Holland, Attorney at Law on behalf of Lt. Muhammad appeared before the Board and stated that they are requesting that Member Scarola recuse himself from her client's hearing; however, they learned as of yesterday that if Member Scarola is recused there would be only two Members, which would not constitute a quorum. She went on to say that the reason for the recusal is Member Scarola has already gone on record opining that there is no merit to Lt. Muhammad's claim in his March 29, 2009 memo to the City where he stated among other things that he could find no evidentiary proof of the claim made by Lt. Muhammad and recommended that the examination scores remain unchanged. Attorney Holland further stated that for this reason, there is a clear impediment to Lt. Muhammad's ability to receive a fair and impartial hearing so they are asking for the recusal of Member Scarola and if at all possible this matter be advanced on the Board's docket because she has been informed yesterday that a postponement would result in Lt. Muhammad having to wait until June to have his case heard by the Board. She stated that in as much as this recusal is not being asked for any reason but a legitimate reason they are asking that the Board advance this matter.

Chairman de la O responded that with regards to Attorney Holland's last request of advancing her client's hearing is sort of at odds because if Member Scarola gets recused, he does not know when the Board would have a quorum so it can never be advanced until the Board has a quorum. He went on to say that the other issue is there are going to be changes with the Board Members some time in April or May of this year and he does not know if this would be a one or multiple day hearing; therefore, the Board would have to begin the hearing when it knows it can be finished. Chairman de la O further stated that these are but a few issues that need to be considered.

For clarification purposes with regards to the recusal of a Board Member, Chairman de la O asked Special Counsel Everett if he was correct in understanding that the Board does not vote on a recusal rather it is the Board Member (himself/herself) that makes the decision. Special Counsel Everett responded in the affirmative.

Chairman de la O asked Special Counsel Everett if Member Scarola discussed the matter with her. Special Counsel Everett responded that Member Scarola did speak with her but she was not sure if a motion had been filed for his recusal.

Attorney Holland responded that she did not file a motion, there had been no discussion; however she did talk to ACA Min yesterday afternoon on the matter.

Special Counsel Everett stated that her understanding of the basis of the recusal is that Member Scarola made a previous finding related to Lt. Muhammad's complaint; however, she was not sure if what Member Scarola investigated at that time would be the same information that would be brought before the Board through this adversarial proceeding.

Chairman de la O asked if this was a finding that Member Scarola made in his role as Chief Examiner. Special Counsel Everett responded in the affirmative.

ACA Min stated that he would proffer that assuming this hearing goes forward that he will rely on the memorandum prepared by Member Scarola that provides his finding on Lt. Muhammad's complaint.

Chairman de la O stated that the concern he sees the Board would have is if it is the Chief Examiner's role to conduct hearings and make recommendations [per Civil Service Rule 4.2], it would seem that any time he makes a recommendation either way, whether in favor or against an employee, he is going to get recused, but this would be contradictory as to how the rules are set up.

Attorney Holland stated that in addition to Member Scarola's recommendation which they believe goes to the very heart and merit of Lt. Muhammad's claim, on or about April 2009 there was discussion on this matter at which time the Board considered whether or not to allow Lt. Muhammad to proceed with a hearing pursuant to Rule 16.2. She went on to say at that hearing Member Scarola voiced disappointment that the Board would even vote on the matter, that in the future if the Board was going to allow such hearings to proceed after he has made a recommendation that the Board should not waste his time allowing him to investigate these matters, so respectfully they believe Member Scarola has voiced some antipathy towards Lt. Muhammad even being entitled to have a hearing.

Chairman de la O stated that to be fair to Member Scarola he thinks his disappointment was more with the Board than with Lt. Muhammad. He went on to say that it was the situation that caused the frustration because he was at the meeting when Member Scarola made those comments. Chairman de la O asked Member Scarola for his position on the employee's request that he recuse himself from the hearing.

Member Scarola stated that he spoke with Special Counsel Everett and at this time, he is not ready to recuse himself. He went on to say that when he made the comments at a prior meeting, his frustration was with the Board because his understanding of the way things were to proceed was to have a hearing. Member Scarola further stated that there are two ways for which an employee can have their matter heard, one of which is [the Chief Examiner] meeting with the employee and reviewing all evidence presented or be heard by a full Board. (Lt. Muhammad requested an investigation pursuant to Civil Service Rule 4.2 or 16.2). He stated that in his opinion, Lt. Muhammad will have a double opportunity because he has already had an opportunity to present evidence (when he as Chief Examiner investigated his complaint) and he will also have another opportunity to present evidence to this Board during which he might present new evidence that could change his mind. Member Scarola went on to say that his one concern at the previous meeting was that the Board wanted to make sure that a matter did not get heard many times so he felt that if the Board approved a motion for the Chief Examiner to handle Lt. Muhammad's investigation that should be the case and if a motion was approved for the Board to hold the hearing it should be so, but when there is a dual procedure, it results in the employee having two hearings, which was his frustration at the time. He further stated that after talking with the Board's special counsel, she does not think he has to recuse himself and he thinks he can be fair, he is willing to listen to new evidence, and at this time he could not say whether Lt.

Muhammad's complaint has merit because his hearing will begin anew with evidence, testimony, etc.

Chairman de la O asked Special Counsel Everett if the decision made by Member Scarola during his investigation of Lt. Muhammad's complaint comes to the Board with no presumption of correctness because this is a de novo hearing on what is presented today. Special Counsel Everett responded in the affirmative. She went on to say that not having a copy of Member Scarola's report or knowing what he went through at the time, he reviewed certain information or facts that were available to him and obviously the employee objected to his findings and felt there was sufficient information for him to go forward to prove his case. Special Counsel Everett further stated that Member Scarola investigated Lt. Muhammad's complaint, had certain facts before him, reached a result based on those facts and Lt. Muhammad has an opportunity to bring forth whatever relevant information he thinks should be presented to the Board. She stated that if the facts are different or there is additional information, Member Scarola can and will consider it as will other Board Members.

Chairman de la O advised Attorney Holland that she had a ruling on her request (in that Member Scarola is not going to recuse himself from Lt. Muhammad's hearing.) He asked Attorney Holland if there was anything else she wished to present to the Board. Attorney Holland responded that in view of Member Scarola's refusal to recuse himself, she had consultation with the department's attorney yesterday regarding this matter and they did agree to dismiss the witnesses since they were seeking a recusal; therefore, she would ask that the hearing be continued.

Chairman de la O asked if the continuance would be charged jointly or is it an continuance for which the department has no objection. ACA Min responded that it is the employee's request for a continuance of which he has no objection.

Chairman de la O asked if this is the first time Lt. Muhammad's hearing was scheduled. The Executive Secretary responded in the affirmative.

ACA Min stated that there were two motions filed by the department so he did not know if either Attorney Holland or the Board wished to discuss them today. Prior to receiving a response, ACA Min informed the Board that the motions will be discussed at the meeting for which Lt. Muhammad's hearing is scheduled per the Executive Secretary.

Following discussion, the Board entered a motion to CONTINUE the grievance hearing of Lt. Neal Muhammad and charge the continuance to the employee, which resulted as follows:

Motion by Chief Examiner Scarola, seconded by Member Dames, that this matter be CONTINUED. PASSED by the following vote.

Aye: Chairperson de la O, Dames and Scarola

Vacant: **Vacancy and **Vacancy

PRESENTATION:

Prior to adjourning, Chairman de la O on behalf of Board Members and Office Staff presented a Certificate of Appreciation to Jessica Angel-Capo for her service as a Member of the Civil Service Board. Member Angel-Capo resigned January 11, 2010.

ADJOURNMENT:

The Chairman called for a motion to ADJOURN which resulted as follows:

**Motion by Chief Examiner Scarola, seconded by Member Dames, to APPROVE.
PASSED by the following vote.**

Aye: Chairperson de la O, Dames and Scarola

Vacant: **Vacancy and **Vacancy

The meeting adjourned at 10:59 a.m.

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary