City of Miami

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

Tuesday, January 26, 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 10:16 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 January 12, 2010.

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

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

Vacant: Member **Vacancy and Member **Vacancy

B. PERSONNEL MATTERS

C. MILITARY LEAVES OF ABSENCE

C.1 Daniel Sanon, Police Officer, requests Active Duty Military Leave, without pay, from January 14, 2010 through March 14, 2010. Copy of Orders submitted. (DISCUSSION)

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

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

Vacant: Member **Vacancy and Member **Vacancy

D. DISCIPLINARY MATTERS

E. GENERAL ITEMS

E.1 Copy of a Settlement Agreement between the City of Miami and Kate Abia, Police Officer, concerning her termination, effective July 21, 2008. (NOTIFICATION)

NOTIFIED

E.2 Copy of a Settlement Agreement between City of Miami and Mario R. Gonzalez, Police Officer, concerning the hearing of appeal relative to his 120-hour suspension, effective May 29, 2009. (NOTIFICATION)
Hearing of appeal was scheduled for February 9, 2010; Notice of Withdrawal pending.

NOTIFIED

E.3

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 January 12, 2010.

Chairman de la O asked the department's attorney if he had any objections to the proposed findings of fact. Barnaby Min, Assistant City Attorney (ACA) responded in the negative.

Chairman de la O asked the employee's attorney if she had any objections to the proposed findings of fact. Teri Guttman-Valdes, Attorney at Law, responded in the affirmative. She went on to say that she attempted to send a copy of her proposed changes via email, but she was not successful because the City's server was down; however, she is prepared to present her proposed changes to the Board. Attorney Guttman-Valdes directed the Board to page 1, third paragraph, which states, "The Appellant was terminated for the following:". She went on to say that she is proposing that the sentence be amended to read, "THE REPRIMAND SETS FORTH THE FOLLOWING ALLEGATIONS AS THE BASIS FOR HIS TERMINATION:" (Verbiage in ALL CAPS indicates proposed language to be either stricken or added.) ACA Min stated that he had no objection.

Chairman de la O stated that the sentence will be amended and asked Attorney Guttman-Valdes if she had any other proposed changes. Attorney Guttman-Valdes responded in the affirmative and directed the Board to page 4, under the subheading, FINDINGS OF FACT, second paragraph, and requested to strike the sentence which states, "FURTHER, THE ARRESTEE INDICATED THAT HE WAS RELEASED AT APPROXIMATELY 4:30 A.M." She went on to say that she is asking that this sentence be stricken because there was no direct evidence to support this finding of fact.

Following argument by attorneys, Chairman de la O stated that his understanding of the case law is that a hearsay statement in an administrative hearing cannot be introduced simply to be uncorroborated to establish an ultimate fact in the hearing, but he did not see this as being one of those ultimate facts; nor did he see it as the basis for striking this sentence from the findings. He stated that the sentence will not be stricken and asked Attorney Guttman-Valdes if she had any other changes she wished to make to the findings of fact. Attorney Guttman-Valdes responded in the affirmative and directed the Board to page 5 and asked that the following three sentences in the first paragraph be stricken because they were not supported by direct evidence: "FURTHER, DURING THIS PROCESS, A "315" WAS ISSUED. A "315" REQUIRES ALL AVAILABLE POLICE OFFICERS TO IMMEDIATELY RESPOND FOR ASSISTANCE. THE APPELLANT DID NOT RESPOND."

Following argument by the attorneys and discussion by the Board, the Chairman called for a motion to strike the sentences from the first paragraph as proposed by the employee. Hearing none, Chairman de la O stated that the sentences will remain in the findings.

Attorney Guttman-Valdes directed the Board to the second paragraph on page 5. She went on to say that while she had no objection to the first two sentences, she did object to the remaining sentences in the paragraph because they are not based on competent substantial evidence in the record, and therefore requests that the following language be stricken from the findings which states, "WHILE THE APPELLANT TESTIFIED THAT HE DID NOT KNOW THAT MR. MURRAY WAS A PROSTITUTE, IN HIS SWORN/TAPED STATEMENT TO SERGEANT LUQUIS, HE ADMITTED THAT BASED

ON HIS EXPERIENCE AS A POLICE OFFICER AS WELL AS MR. MURRAY'S APPEARANCE, IT WAS CLEAR TO HIM THAT MR. MURRAY WAS INDEED A PROSTITUTE. NEVERTHELESS, THE APPELLANT DROVE UP TO MR. MURRAY, IN HIS MARKED POLICE VEHICLE, AND ENGAGED IN A CONVERSATION ABOUT SEX IN EXCHANGE FOR MONEY. THE APPELLANT THEN HAD MR. MURRAY GET INTO THE BACK SEAT OF HIS MARKED, CITY OF MIAMI PATROL VEHICLE, LAY DOWN, AND THE APPELLANT THEN DROVE TO A SEPARATE LOCATION. AT THAT SEPARATE LOCATION, BOTH MR. MURRAY AND THE APPELLANT EXITED THE POLICE VEHICLE. THE APPELLANT THEN REMOVED MR. MURRAY'S PENIS FROM HIS UNDERWEAR AND BEGAN FONDLING HIS PENIS. THE APPELLANT ALSO INSERTED HIS FINGER INTO MR. MURRAY'S ANUS. THE APPELLANT THEN HAD MR. MURRAY PERFORM ORAL SEX. WHEN THE APPELLANT EJACULATED, MR. MURRAY CAUGHT THE APPELLANT'S SEMEN WITH HIS HAND AND WIPED IT ON HIS LEG AND UNDERWEAR. THE APPELLANT DID NOT PAY MR. MURRAY FOR THE SEXUAL ACT, BUT RATHER, RETURNED MR. MURRAY TO A LOCATION NEAR WHERE HE ORIGINALLY PICKED UP MR. MURRAY. THE APPELLANT THEN RETURNED TO HIS ASSIGNED AREA IN THE CENTRAL DISTRICT. A REVIEW OF THE APPELLANT'S WORKSHEETS ALSO REVEALED THAT HIS ENTIRE TRIP TO THE NORTH DISTRICT WAS NEVER DOCUMENTED."

Following argument by the attorneys and discussion by the Board, the Chairman called for a motion to strike the various sentences in paragraph 2 as requested by the employee. Hearing none, Chairman de la O stated that all of paragraph 2 will remain in the findings.

Attorney Guttman Valdes directed the Board to page 6 and stated that the following paragraphs should be stricken because they are not based on competent substantial evidence in the record:

Paragraph 1 : "APPROXIMATELY 30 MINUTES LATER, MR. MURRAY CONTACTED THE CITY OF MIAMI POLICE DEPARTMENT. MR. MURRAY MET WITH THE INVESTIGATORS FROM THE INTERNAL AFFAIRS DIVISION AND INFORMED THEM OF THE EVENTS THAT OCCURRED. MR. MURRAY ALSO SURRENDERED HIS CLOTHING, INCLUDING UNDERWEAR, TO THE INVESTIGATORS FOR FURTHER TESTING."

Paragraph 3: "THE APPELLANT TESTIFIED IN THE HEARING BEFORE THIS BOARD AND THE BOARD FINDS THE APPELLANT'S TESTIMONY LACKED CREDIBILITY. MANY POINTS OF THE APPELLANT'S TESTIMONY SIMPLY DID NOT MAKE SENSE. OTHER PORTIONS OF THE APPELLANT'S TESTIMONY WERE CONTRADICTED BY HIS PREVIOUS SWORN/TAPED STATEMENT TO SERGEANT LUQUIS AND HIS SWORN TESTIMONY AT THE UNEMPLOYMENT COMPENSATION HEARING. ACCORDINGLY, THE BOARD HAS GIVEN VERY LITTLE WEIGHT TO THE APPELLANT'S TESTIMONY."

Following argument by the attorneys and discussion by the Board, the Chairman called for a motion to strike paragraphs 1 and 3 on page 6 of the findings as requested by the employee. Hearing none, Chairman de la O stated that paragraphs 1 and 3 will remain in the findings.

Attorney Guttman-Valdes stated that she objected to the Conclusions of Law and asks that it be stricken because the information is based on facts that are not competent substantial evidence in the record.

Chairman de la O called for a motion to strike the Conclusions of Law in its entirety as requested by the employee. Hearing none, Chairman de la O stated that the

Conclusions of Law will remain in the findings.

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

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

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

Vacant: Member **Vacancy and Member **Vacancy

E.4 Copy of Findings of Fact concerning the appeal hearing of Larry Jackson, Police Officer. (DISCUSSION)

Osnat, K. Rind, Attorney at Law on behalf of Officer Jackson, distributed her drafts of the findings, then stated that she would suggest that the Board use the findings that contained proposed changes submitted by ACA Min because she did not object to many of the recommended changes since it also incorporated her changes.

Chairman de la O asked ACA Min if he had any objections to the proposed findings. ACA Min responded that since the Board would be working from the proposed changes he submitted, he did not have any objections; however, he believed Attorney Rind's main objection was regarding paragraph 3.

Chairman de la O asked Attorney Rind if paragraph 3 was her only objection. Attorney Rind responded that she did have a comment concerning paragraph 2.

For clarification purposes, Chairman de la O asked Attorney Rind if she does not raise an objection, this would mean that she is in agreement with the proposed changes submitted by ACA Min. Attorney Rind responded in the affirmative.

Chairman de la O suggested that the Board begin on page 3, under the Findings of Fact section, paragraph 2 and asked Attorney Rind to state her objection. Attorney Rind stated that while she does not object to paragraph 2, there is a statement in the paragraph that reads, "The money was never counted at the scene." She stated that while this is a true fact, she would not have an objection if language from paragraph 3 was added. Not finishing her initial thought, Attorney Rind stated that she felt the Board should begin discussion with paragraph 3 and after she has given an explanation, the Board would understand why. Attorney Rind went on to say that she recalls during the Board's discussion the Chairman commented that he believed the preponderance of the evidence showed that SOP 12-6 was in effect at the time and that SOP did not require money be counted in the presence of a supervisor which is the reason her proposed version in the findings reads the way it does as opposed to the City's version which says that it did not know which SOP applied at the time. She further stated that she thinks she did prove SOP 12-6 applied at the time so if the City wants to add the language, "The money was never counted at the scene.", she would then want to add language to paragraph 3 that says SOP 12-6 did not require that the money count be conducted at the scene or in the presence of a supervisor.

Chairman de la O stated that someone could correct him if he is wrong, but he recalled that the Board found that SOP 12-6 was in effect at the time (the incident took place). ACA Min responded that he would stipulate that he believed the Board's finding was that SOP 12-6 was applicable at the time, but his reason for writing the finding the way it is proposed in the draft was because it was the department's position that SOP 1-6 and 12-6 applied, but the Board found that because SOP 1-6 was not signed, only SOP 12-6

was applicable, so he included all of this information in paragraph 3. Chairman de la O stated that he did not think the flavor of paragraph 3 as written by the department was as strong as the Board's finding; therefore, he thinks paragraph 3 needs to also include a sentence that says, "THE BOARD FINDS THAT SOP 12-6 WAS IN EFFECT AT THE TIME." ACA Min stated that he had no objection to adding this sentence.

Chairman de la O stated that [his recommendation] would require Board approval, but his proposal would be to amend paragraph 3 so that it reads, "Although the current CSU Standard Operating Procedures, Section 1-6, require that any recovered money in excess of $1,000.00 is to be counted by the officer in the presence of a supervisor, THE BOARD FOUND THAT SOP 12-6 WAS IN EFFECT AT THE TIME THE FUNDS WERE SEIZED. Sgt. Jackson's conduct of handing the property over to an officer who, in turn, would conduct the money count was consistent with SOP 12-6."

Attorney Rind stated she would also like to include language in paragraph 3 that states the money did not have to be counted at the scene and also that Sgt. Jackson's actions were consistent with the department's practice at the time since she did put on testimony from Sgt. Ortiz and others that Sgt. Jackson's action was consistent with the department's practice at that time.

Chairman de la O stated that in light [of there being testimony about Sgt. Jackson's action being consistent with the department's practice], he would suggest adding to the end of paragraph 3, page 4, the following: "consistent with SOP 12-6, AND THE PRACTICE IN THE DEPARTMENT AT THE TIME, WHICH DID NOT REQUIRE THE FUNDS TO BE COUNTED AT THE SCENE." Chairman de la O asked Attorney Rind if adding this language would satisfy her concern. Attorney Rind responded that it does as long as it is clear that the first sentence also covers the phrase, "not in the presence of a supervisor." She went on to say that it is not clear the way it is written, but she would not object.

Chairman de la O stated that as he has it written, the sentence in paragraph 3 would read, "Sgt. Jackson's conduct of handing the property over to an officer who, in turn, would conduct the money count was consistent with the Standard Operating Procedures, Section 12-6, and the practice in the department at the time, which did not require the funds to be counted at the scene or in the presence of a supervisor." He asked ACA Min if he had an objection to paragraph 3 as amended. ACA Min responded that he did not agree, but he believes that was the Board's finding.

Chairman de la O asked if either attorney had any other proposed changes to the findings. Hearing none, Chairman de la O called for a motion to APPROVE the findings of fact as amended today, which resulted as follows:

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

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

Vacant: Member **Vacancy and Member **Vacancy

E.5 Copy of Findings of Fact concerning the appeal hearing of Harvey Nairn, Police Officer, relative to his 20-hour suspension, effective March 4, 2009. (DISCUSSION)

Chairman de la O asked if there were any objections to the findings. ACA Min responded in the negative.

Chairman de la O asked if there were any objections by the employee. Member Scarola

responded that he did not see Officer Nairn in attendance.

Chairman de la O asked if Officer Nairn was represented by counsel. The Executive Secretary responded in the negative. She went on to say that Officer Nairn was noticed that this matter would be on today's agenda for Board consideration; however, she has not heard from him.

Following discussion, the Board entered a motion to APPROVE the Findings of Fact which resulted as follows:

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

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

Vacant: Member **Vacancy and Member **Vacancy

E.6

Notice of a Request to Continue from Osnat K. Rind, Attorney, on behalf Rameses Rengifo, Police Officer, relative to his 10-hour suspension, effective April 25, 2009. (DISCUSSION)
Hearing of appeal is scheduled for today.

Attorney Rind stated that Items E. 6 (Officer Rameses Rengifo) and E. 7 (Griecy Lovin) are continuance requests for two cases that are scheduled today. She went on to say that she would ask that the continuances be charged to the Board since the Board probably will not have sufficient time to hear these cases today.

Cynthia A. Everett, Special Counsel to the Board, asked Attorney Rind to provide the Board with her reason for requesting a continuance of the two cases. Attorney Rind responded that she asked for the continuances on the basis that she has two other cases scheduled and she is not prepared to go forward today.

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

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

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

Vacant: Member **Vacancy and Member **Vacancy

E.7

Notice of a Request to Continue from Osnat K. Rind, Attorney, on behalf of Greicy Lovin, Crime Prevention Specialist, relative to her 5-hour forfeiture, effective March 5, 2009. Barnaby Min, Assistant City Attorney, expressed no objection to the continuance. (DISCUSSION)
Hearing of appeal is scheduled for today.

Chairman de la O asked the department's attorney if he had an objection to the employee's request for a continuance. ACA Min responded in the negative.

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

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

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

Vacant: Member **Vacancy and Member **Vacancy

E.8 Copy of a Memorandum from Barnaby Min, Assistant City Attorney, on behalf of the City, advising the 40-suspension (reprimand #09-008), effective May 29, 2009, concerning Daniel Ubeda, Police Officer is being withdrawn by the Department of Police. Officer Ubeda 40-hours will be restored. (NOTIFICATION)

NOTIFIED

E.9 Copy of a revised Judgment "*Remand from Circuit Court"* from the City Manager concurring with the Board in finding Milton McKinnon, Police Officer, guilty as set forth in the disciplinary letter, effective June 16, 2008 and ordering that he be terminated. The Board recommended a 600-hour suspension. (NOTIFICATION)

NOTIFIED

F. REPORTS

F.1 Pending Hearings as of January 26, 2010. (NOTIFICATION)

G. REQUESTS FOR HEARINGS

G.1 Copy of a Request for a Whistleblower Hearing from Robert Anthony Bogdan, Attorney, on behalf of Steven S. Wolf, Investigator, relative to his termination, effective October 1, 2009. (DISCUSSION)
Deferred from the meeting of December 15, 2009.

Chairman de la O stated that he needed to say something on the record about this case before the attorneys argued their positions. He went on to say that as he was driving to today's meeting, he was thinking about this case and realized that he has too many connections to the Civilian Investigative Panel (CIP). He went on to say that he was on the Nominating Committee so some of the CIP Members are on that Board as a result of his participation in the Nomination Committee and that he has personal friends who are attached to the Board. Chairman de la O further stated that as he thought more about it, he felt that if he was on Attorney Bogdan's side, he would not feel comfort with himself sitting on the discussion. He stated that whether it is an actual basis for a recusal or not, he think it is better that he recuse himself from voting on this matter. He stated that he will be off of the Board soon so if a hearing is granted, he would no longer be on the Board when it was scheduled. Chairman de la o went on to say that he thought it was fair for Mr. Wolf to know and while no one made a motion for his recusal, he began to feel uncomfortable about weighing in on this matter and felt it was best that he recuse himself.

Special Counsel Everett asked Chairman de la O to pass the gavel to Member Scarola since he recused himself.

Attorney Bogdan stated that the discussion the Board has been having over the previous meetings had to do with whether his client stated a case under the Statute.

Member Dames raised the issue of whether there was a quorum since Chairman de la O recused himself. Special Counsel Everett responded that the Board has a quorum; however, Chairman de la O will abstain from voting on this matter since he recused himself.

ACA Min asked Attorney Bogdan if he had a problem with only two Members voting on his client's request for a hearing. Attorney Bogdan responded in the negative.

The Board entertained argument from Attorneys Bogdan, Mays, and Min as to their interpretation of Florida Statutes 112.3187(6)(7) as it relates to the proper authority that must be notified concerning a whistleblower claim, whether Mr. Wolfe followed protocol as outlined in the Statutes, and also whether his request for a hearing should be granted. Following discussion, Member Dames stated that he thinks Attorney Bogdan proved to him that his client reported his whistleblower claim to the appropriate official [as prescribed in the Statute.]

ACA Min asked Member Dames to name the appropriate officials [that Mr. Wolfe reported his claim to.] Special Counsel Everett responded that she did not think ACA Min's question was appropriate to put before Member Dames at this time because he only stated his position and there has not been a formal vote on this matter.

Chairman Scarola stated that he agreed with Member Dames [as it relates to proper notification of a whistleblower claim . He went on to say that, for example, if Member Dames were to notify his superior of an impropriety and his superior failed to take it any further, that it is not to say that Member Dames did not try to take action to effect a whistleblower claim. Chairman Scarola further stated that [based upon the department's argument], it makes one wonder how many people have to be notified before it reaches the top person [or Chief Executive Officer of the City] so that something can be done regarding the complaint. He stated that [ACA Min mentioned that the Statute would not be satisfied if only one commissioner is notified of a whistleblower complaint rather it has to be the entire body since one commissioner cannot act alone] however, he feels that if Special Counsel Everett for example brought a problem to him, she puts the burden on him to say to the Board that there is a problem. Chairman Scarola further stated that this might meet the burden, but he did not know because he and Member Dames are not attorneys and the only Board Member that is an attorney has recused himself so they have to go by their gut feelings. He stated that there might be some legal issues that come along later, but both Members have heard from the attorneys and need to make a decision whether to grant Mr. Wolf's request for a hearing.

Following discussion, the Board entered a motion to GRANT Mr. Wolf's request for a hearing which resulted as follows:

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

Aye: Chief Examiner Scarola and Member Dames

Abstain: Chairperson de la O

Vacant: Member **Vacancy and Member **Vacancy

G.2 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)
Deferred from the meeting of January 12, 2010.

DEFERRED TO THE FEBRUARY 9, 2010 MEETING

H. TODAY'S HEARINGS

H.1 Hearing of appeal on behalf of Tika Jones, Police Officer, relative to a 10-hour suspension, effective November 23, 2008.

Based upon a review of Departmental Order 5, Section 4.4.18, the Board found that this order does not contain a provision for officers failing to schedule a pre-file conference and decided that any reprimand containing the charge of an officer's failure to schedule a pre-file conference, that reprimand would be thrown out.

Based upon the Board's finding, a motion was entered not to count this reprimand against Officer Jones and to recommend to the City Manager that the 10 hours be restored to Officer Jones. (See Item H.4 for more details on the hearing as it relates to scheduling pre-file conferences). The motion resulted as follows:

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

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

Vacant: Member **Vacancy and Member **Vacancy

H.2 Hearing of appeal on behalf of Tika Jones, Police Officer, relative to a 10-hour suspension, effective May 31, 2009.

Based upon a review of Departmental Order 5, Section 4.4.18, the Board found that this order does not contain a provision for officers failing to schedule a pre-file conference and decided that any reprimand containing the charge of an officer's failure to schedule a pre-file conference, that reprimand would be thrown out.

Based upon the Board's finding, a motion was entered to find Officer Jones GUILTY of the charges against her, and to recommend to the City Manager that the 10 hours be restored to Officer Jones. (See Item H.4 for more details on the hearing as it relates to scheduling pre-file conferences). The motion resulted as follows:

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

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

Vacant: Member **Vacancy and Member **Vacancy

H.3 Hearing of appeal on behalf of Tika Jones, Police Officer, relative to a 20-hour suspension, effective June 1, 2009.

Based upon a review of Departmental Order 5, Section 4.4.18, the Board found that this order does not contain a provision for officers failing to schedule a pre-file conference and decided that any reprimand containing the charge of an officer's failure to schedule a pre-file conference, that reprimand would be thrown out.

Based upon the Board's finding, a motion was entered to find Officer Jones GUILTY of the charges against her, and to recommend to the City Manager that the 20 hours be restored to Officer Jones. (See Item H.4 for more details on the hearing). The motion resulted as follows:

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

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

Vacant: Member **Vacancy and Member **Vacancy

H.4 Hearing of appeal on behalf of Tika Jones, Police Officer, relative to a 20-hour suspension, effective January 6, 2009.

The Chairman asked Officer Jones if she would be agreeing to the Board hearing all four of her cases (Items H.1 through H.4) together and that she will also agree to what she has been accused of, but she disagrees with the penalties. Officer Jones responded in the affirmative.

Chairman de la O asked Officer Jones to provide to the Board her reasons for missing court. Officer Jones responded that in most cases, she forgot to call in and another reason was caring for her son. She went on to say that while she does admit the facts are true, she does not agree with the penalty especially since it would affect her seniority, bidding, etc. Officer Jones further stated that she has improved in this area and wants to move forward in her career.

The Board entered into the scheduled hearings (Items H.1 through H.4) of Officer Tika Jones, the Appellant.

Barnaby Min, Assistant City Attorney, represented the Department.

Tika Jones, Police Officer, represented herself.

Opening statements were made by ACA Min and the Appellant.

Officer Jones agreed that she violated all of the departmental orders and Civil Service Rules cited in the four reprimands; therefore the Board went directly to the Penalty Phase of Officer Jones' hearing.

ACA Min presented no witness testimony, but provided a slide presentation to the Board as to the recommended penalty. Officer Jones offered no witness testimony during the penalty phase of her hearing.

Following final argument, Member Scarola stated that the only problem he has is the department interpreted a failure to schedule a pre-file conference as an occurrence of missed court. He went on to say that his understanding [of the departmental order] was that the penalty schedule was used for missing court and not for an officer's failure to set a pre-file conference.

ACA Min stated that it is the department's position that Departmental Order 5.4.4.18 covers all court-related incidents such as subpoenas, pre-files, and depositions which are listed in the order.

Chairman de la O read into the record, Departmental Order 5.4 and stated that the order mentions the failure of attending a pre-file conference, but not the failure of scheduling a pre-file conference for which Officer Jones was charged. He asked ACA Min to explain why failing to attend a pre-file conference is the same as failing to schedule a pre-file conference. ACA Min responded that Departmental Order 5, Section 4.4.18 requires

police officers to schedule or reschedule their pre-file conferences and if they fail to do so, they would be in violation of this departmental order.

Member Scarola stated that if Officer Jones missed the pre-file conference he could agree with ACA Min, but in this case Officer Jones did not set the pre-file conference. ACA Min argued that if the pre-file conference is not scheduled, then the officer would miss the pre-file conference.

Chairman de la O stated that they are not same and asked ACA Min what would be the outcome of Officer Jones' penalty if he did not consider any of the reprimands that charged her with failing to schedule a pre-file conference. ACA Min responded that if the Board was not going to consider the November 23, 2007 incident (reprimand #08-037, 20-hour suspension, effective January 6, 2009) for which Officer Jones failed to schedule a pre-file conference with the State Attorney's Office' this would change the 7 occurrences of missed court (from 1/07 - 8/08) to three occurrences, which are reflected in reprimand #08-037 (20-hour suspension, effective January 6, 2009), reprimand #08-300 (10-hour suspension, effective May 31, 2009) and reprimand #09-010 (20-hour suspension, effective June 1, 2009). He went on to say that according to the penalty schedule for court-related incidents that is included under Departmental Order 5.4.4.18, Officer Jones' penalties would be as follows (based on the date of occurrence):

First Occurrence: 04/22/08 - Reprimand #08-122 (10-hour suspension, effective November 23, 2008) would be changed to a reprimand only.

Second Occurrence: 07/22/08 - Reprimand #08-300 (10-hour suspension, effective May 31, 2009) would be changed to a reprimand only.

Third Occurrence: 08/26/2008 - Reprimand #09-010 (20-hour suspension, effective June 1, 2009 would be changed to a 10-hour suspension.

Following discussion on the penalty phase, Special Counsel Everett reminded the Board that along with its motion on the penalty that the Board needs to also include a finding of guilt on the various charges and allegations. Chairman de la O responded that what the Board would be ruling on is only on the last reprimand because it became Officer Jones' third violation within 12 months. He went on to say that while Officer Jones is guilty of the violations cited in all of the reprimands, the penalty of a 10-hour suspension (the only one that could be appealed to the Board) would apply to the last reprimand (#09-010, effective June 1, 2009).

Member Scarola stated that he thinks court is one of the most important things police officers do. He went on to say that he has been employed with the City of Miami for 30 years and he had one missed court experience during his tenure; however, he called ahead of time because it was an issue. Member Scarola further stated there was a time period when matters concerning court became a little ridiculous; however, he thinks officers need to take responsibility for attending court. He stated that if an officer takes the action on the streets to incarcerate someone, write a traffic summons, etc., it is the officer's responsibility to attend court so that the person does not have to sit in court on the issues, but on the other hand, the way the departmental orders have been interpreted by past leaderships was a little crazy, but the State took care of this matter and sent out notifications. Member Scarola went on to say that while Officer Jones was wrong (for not scheduling her pre-file conference) he did not think this charge should have been included with other court-related violations [especially when it is not spelled out in the departmental orders.].

Chairman de la O stated that if the police department wants to charge an officer with

failing to schedule a pre-file, it can do so by amending its departmental orders and the Board will enforce it.

Member Dames asked if Officer Jones would be restored 50 hours based upon the Board's finding. ACA Min responded that as he understands it, Officer Jones will receive two reprimands [for the first and second occurrences] and a 10-hour suspension for the third occurrence of missed court in a 12-month period. Chairman de la O confirmed that the Board's motion would be that Officer Jones receives two reprimands and a 10-hour suspension.

Following discussion, the Board found that any reprimands issued to Officer Jones for failing to schedule a pre-file conference would not be counted as an occurrence of missed court because this provision is not covered under Departmental Order 5.4.4.18 that deals with the penalty for missed court.

The Board entered a motion to find Officer Tika Jones GUILTY of all of the charges and recommend to the City Manager that she receive a reprimand and 10-hour suspension in lieu of the 60-hour suspension imposed by the department. The motion resulted as follows:

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

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

Vacant: Member **Vacancy and Member **Vacancy

H.5 Hearing on behalf of Raul Cabrera, Police Officer, concerning his resignation from employment.

The Board entered into the hearing on behalf of Officer Raul Cabrera, the Appellant, pursuant to Rule 14.3.

Barnaby Min, Assistant City Attorney, represented the Department. Osnat K. Rind, Attorney at Law, represented the Appellant.

The Rule of Witnesses was invoked and all witnesses were sworn in individually. Opening statements were made by both attorneys.

Witnesses for the Department appeared in the following order:

1. Jesus Ibalmea, Sergeant of Police, City of Miami, Department of Police.

Questions were posed by Board Members de la O, Dames, and Scarola during the testimony of Sgt. Ibalmea.

At the conclusion of the department's direct examination of Witness Ibalmeda, Member Scarola apprised the Board that at the time Internal Affairs (IA) took a statement from Officer Cabrera, he sat in on the interview to ensure that he was afforded his rights, but that was the extent of his involvement in this case.

ACA Min responded that he was aware Member Scarola sat in when IA took Officer Cabrera's statement and he had no objection [to Member Scarola voting on this case.].

2. Andrew Boan, Sergeant of Police, City of Miami, Department of Police.

Questions were posed by Board Members Dames and Scarola during the testimony of Sgt. Boan.

The Department rested its case.

Witnesses for the Appellant appeared in the following order:

Raul Cabrera, Police Officer, City of Miami, Department of Police, testified on his own behalf.

Questions were posed by Member Dames during the testimony of Officer Cabrera.

The Appellant rested his case and the Chairman called for closing arguments.

Following final argument by the attorneys, Chairman de la O stated that as he sees it, ACA Min feels that the burden is on the Appellant because it is a resignation case; however, he partially disagrees with his statement. He went on to say that the burden is on the department to prove there was a resignation and he thinks this burden was met because all the department had to do was introduce the red-line memo that the Appellant admitted he signed, which was done. Chairman de la O further stated that since the department met its burden of there being a resignation, the question becomes: Is there an affirmative defense that the employee can put forth to undue the resignation? He stated that the Appellant has two defenses which are duress and revocation. Chairman de la O went on to say that the Appellant stated that he was essentially constructively forced to resign and his other defense is that he revoked the resignation. He further stated that he would address the revocation issue first because he thinks there was a lack of evidence on the part of the Appellant about the revocation; however, there certainly was evidence that he tried to resign because he had a copy of the memo, but he did not know of any standards or evidence that would make that an effective revocation. Chairman de la O stated there were questions asked about an employee by the name of [Lorenzo] Whitehead who was allowed to rescind his revocation, but there was no evidence put on or case law cited (by the employee) to say to the Board that the department must accept the revocation, so he would reject that as an affirmative defense.

Chairman de la O stated that with regards to the issue of duress, the department's argument is Officer Cabrera waited three days to revoke his resignation and he does not see how this would be determinative because he does not see how it would have made any difference if he had done so an hour later or 10 days later. He went on to say that the standards for duress as he recalls the case law is that if one person misleads another or leaves that person in a position where they feel like they have no choice but to do what is asked of them, they are believed to be acting under duress. Chairman de la O further stated what happened in the [IA interview] room (with Sgt. Ibalmeda and Officer Cabrera), he does not know and he was not going to call either one of them a liar because the truth is he has no idea. He went on to say that he will say that it does not make sense to him that neither of the two sergeants gave Officer Cabrera the option of resignation. Chairman de la O further stated one thing that made him pause was ACA Min's argument that maybe [the option of resignation did not come up] because of the discussions Officer Cabrera had with the union representative except at the end of the day, the Board has to make a decision. He stated that it did not make sense to him because all of the information was erroneous and he could not imagine a union representative telling one of its members that he was going to lose his one-percent money, pension, etc. because that is not automatic. Chairman de la O went on to say that with regards to the (Police Officer) Bill of Rights, he wonders was the motivation for the department to want Officer Cabrera to resign was because the reprimand (hat was to be issued to Officer Cabrera)was filed too late. He further stated that the Appellant

has clearly made a prima facie showing that the reprimand was filed too late because the misconduct was reported on June 6 and was not issued until the following February, which was more than 180 days, so he thinks at that point, the burden of proof shifted to the department to show the Board that there had been a tolling (of the time requirement). Chairman de la O stated that he saw language in the Statute that says there are time periods that can toll the Bill of Rights, but there was no evidence about those time periods. He went on to say that there was evidence that the matter was referred to the State Attorney's Office and the Appellant admitted that he did what the department accused him of in the reprimand. Chairman de la O further stated that there was no evidence about how long that time period was, when it happened, and it clearly was less than six months. He stated that he thinks there was a failure in rebutting and he think it is obvious that the department was on notice that [the issue of the 180 days] was going to be a issue at this hearing because they have argued about it [at a previous meeting], so he thinks the department needed to put on testimony to prove that the 180-day time clock had not run out. Chairman de la O went on to say that he wants the record to be clear that it is not considered duress if either sergeant gave Officer Cabrera the option of resigning because it is factually accurate (that he had an option to resign rather than be terminated), but it IS duress if the department misleads the officer into believing certain facts that are not true and according to testimony. He further stated that the Board has an officer (Cabrera) who has been told information that was not accurate and while it is a very close call, in the end he probably would recommend that the department undo the Appellant's resignation and allow him to rescind it.

Member Scarola stated that he has been involved in many cases where an officer has faced termination and in at least two of the termination cases the employee asked what would happen if he resigned before signing the reprimand. He went on to say that while the resignation letter may have been handwritten that day, the effective date was usually at least two to three days into the future. Member Scarola further stated that he agreed with ACA Min that the Appellant may have gotten some of the conversations mixed up especially if you are faced with the situation that you are told you no longer have a job; it is normal that the person's main focus would be on how he was going to pay his bills. He stated in such situations [terminations, serious allegations], the employee should have a union representative present and perhaps the department needs to look into adopting this practice. Member Scarola went on to say that he thinks if the process was properly executed, [the issue of resignation] would not have been a matter of discussion, the department would have terminated the Appellant, and his decision to appeal the termination would have been automatic.

Chairman de la O stated that one of the reasons he also concluded that he did not think it was the union representative who gave the Appellant the information (about the options he had if he were to resign) was because the union representative did not have the reprimand in front of him and he could not have seen (former) Deputy Chief Fernandez' endorsement at the bottom of the reprimand.

Member Scarola stated that he has been on the opposite end of a phone when an employee in IA has told a member that they either resign or be terminated.

Chairman de la O stated that it is not duress if IA tells an employee that he has the option of resigning or being fired. He went on to say that he thinks if the department tells the employee the advantages of resigning that are not true, then that changes the facts, but again he does not think it is duress to tell an employee that they could resign or face termination.

Member Dames stated that the testimony from both sergeants was that they gave the Appellant the option to either agree or disagree with the penalty, but he thinks it was more than that (which was offered). He went on to say that the testimony about the

Appellant going down to his car for approximately an hour [to contact a union representative] and returning with a red-line memo [of his resignation] was a stretch in his opinion. Member Dames further stated that he believed the Appellant when he testified that Sgt. Ibalmeda told him if he did not resign he would lose his police certification, one-percent money, and his pension and also when he testified that he trusted and respected his superiors [Ibalmeda/Boan]. He stated that he knows it is an unwritten rule that an employee can resign and after a couple of days change his mind, and if the superior favors the employee the resignation is rescinded and if not, the resignation remains.

Following discussion, Chairman de la O called for a motion on the Appellant's appeal that was requested pursuant to Rule 14.3.

Attorney Rind stated that she believed the Board would have to find that there was effectively a termination and the termination is therefore reversed with certain findings.

Chairman de la O asked Special Counsel Everett if what Attorney Rind proposed the Board needs to do is correct. Special Counsel Everett responded that if the Board makes the finding that there was duress, then effectively it is a termination constructively.

Chairman de la O stated that he thinks the findings were put on the record already and the Board now needs to make a motion to find that the Appellant was constructively terminated and afterwards the Board can vote on a remedy.

Attorney Rind stated that she agreed the Board would find that there was a termination and in the findings she would want to include facts such as it was beyond the 180-days for issuing discipline and that the Appellant should be reinstated.

Special Counsel Everett stated that what Attorney Rind is now asking is something she did not ask for originally.

ACA Min stated that he understood what the Chairman had said during the Board's deliberation, but the actual issue of whether the 180-days had been tolled, nothing has been presented on that issue.

Chairman de la O stated that he believes what will happen is the department probably would go forward with its discipline assuming the City Manager puts the Appellant back to work, then there is probably going to be a fight over whether the 180 days were tolled or not.

Attorney Rind responded that there has been a termination, the termination is going to be rescinded, and her client should be put back to work; therefore, the department cannot now have a second bite of the apple. She went on to say that the department made a finding about the 180-days, and she wants this information included in the findings. Attorney Rind further stated that there was an entire discussion at the initial request for hearing about (whether to hold this hearing as) a Rule 16 hearing versus a Rule 14 hearing and the reason for that discussion was because presumably if there was a finding of duress and there was a termination, they would have to prove to the Board that there was just cause.

Chairman de la O stated that the problem he sees with what he thinks Attorney Rind is trying to get the Board to do, which is essentially to create res judicata on the issue of whether the Bill of Rights was violated or not, but that was not the central issue of this appeal. He went on to say that it was one of the issues, but the employee can win his duress argument regardless of whether it was true or not. Chairman de la O further

stated that it is not a necessary part of the Board's findings; however, at the end of the day the attorneys can make whatever arguments they want to in front of whatever jurisdiction they are in front of; he does not speak for the department, but he assumes that the department will try to bring the discipline forward. He stated that the Board certainly has not passed on the discipline and it was not one of the Board's issues today as to whether or not the Appellant committed the underlying charges set out in the reprimand.

Attorney Rind stated that issue would have been for the department to prove. Chairman de la O responded that the matter before the Board was not whether the Appellant should have been terminated but whether he was constructively terminated. He went on to say that he was sure that based on what the Board found, the Board would recommend that the Appellant be reinstated and what happens to the discipline, he cannot say what that would be.

Following discussion, the Board entered a motion to find that the department constructively terminated the Appellant, which resulted as follows:

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

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

Vacant: Member **Vacancy and Member **Vacancy

Following the Board's approved motion on the finding in Officer Cabrera case, the Board entered a motion to recommend to the City Manager that the Appellant be reinstated as a police officer which resulted as follows:

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

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

Vacant: Member **Vacancy and Member **Vacancy

H.6 Hearing of appeal on behalf of Marcel Jackson, Police Officer, relative to his 40-hour suspension, effective May 16, 2009.

Chairman de la O stated that the Board will not have time to hear Officer Jackson's case and called for a motion to CONTINUE his hearing and charge the continuance to the Board, which resulted as follows:

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

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

Vacant: Member **Vacancy and Member **Vacancy

H.7 Hearing of appeal on behalf of Roberto Soroa, Police Officer, relative to his 80-hr suspension, effective July 29, 2009.

ACA Min stated that he spoke with Officer Soroa and he is asking for a cotinuance to retain legal counsel. He went on to say that he has no objection to the continuance and he believes this is the employee's first request for a continuance.

Following discussion, the Board entered a motion to CONTINUE the hearing of Officer Roberto Soroa 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: Chief Examiner Scarola, Member Dames and Chairperson de la O

Vacant: Member **Vacancy and Member **Vacancy

H.8 Hearing of appeal on behalf of Daniel Ubeda, Police Officer, relative to a 40-hour suspension, effective May 12, 2009.

ACA Min stated that the department withdrew the reprimand; therefore, this matter can be removed from the Board's docket.

WITHDRAWN

H.9 Hearing of appeal on behalf of Greicy Lovin, Crime Prevention Specialist, relative to her 5-hour forfeiture, effective March 5, 2009.

The Board took no action on this case because a continuance was granted at today's meeting.

CONTINUED

H.10 Hearing of appeal on behalf of Rameses Rengifo, Police Officer, relative to his 10-hour suspension, effective April 25, 2009.

The Board took no action on this case because a continuance was granted at today's meeting.

CONTINUED

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

Vacant: Member **Vacancy and Member **Vacancy

The meeting adjourned at 2:49 p.m. Breaks were taken at 11:18-11:31 a.m. and 12:34-12:40 p.m.

SIGNATURE:

_____

Miguel M. de la O, Chairperson

ATTEST:

_____

Tishria L. Mindingall, Executive Secretary