City of Miami

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

Tuesday, April 6, 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
Gerald Silverman, Board Member
Joseph Kaplan, Board Member

PLEDGE OF ALLEGIANCE

The meeting was called to order at 10:04 a.m. The roll call for Board Members at the commencement of the meeting was as follows:

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

A. APPROVING THE MINUTES OF:

Regular Meeting of March 23, 2010.

Motion by Member Silverman, seconded by Member Dames, to APPROVE. PASSED by the following vote.

Aye: Chairperson de la O, Dames, Scarola, Silverman and Kaplan

B. PERSONNEL MATTERS

C. MILITARY LEAVES OF ABSENCE

D. DISCIPLINARY MATTERS

D.1 Copy of a Judgment from the City Manager concurring with the Board's findings concerning Raul Cabrera, Police Officer, relative to the rejection of the revocation of Officer's Cabrera's resignation. Ordered and adjudged that the decision of the Chief of Police to reject Officer's Cabrera's resignation be reversed. (NOTIFICATION)

NOTIFIED

D.2 Copy of a letter from Chief Miguel A. Exposito, Director, Department of Police, notifying Raul Delgado, Police Officer, of a 10-hour forfeiture, effective May 19, 2009. (NOTIFICATION)

NOTIFIED

D.3 Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Carlos Deschamps, Police Officer, of his 40-hour suspension, effective March 27, 2010. (NOTIFICATION)

NOTIFIED

D.4 Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Sheila Belfort, Police Officer, of her 40-hour suspension, effective April 3, 2010. (NOTIFICATION)

NOTIFIED

D.5 Copy of letter from Barbara Pruitt, Director, Department of Solid Waste, notifying Maurice Mackens, Waste Collector, of his termination, effective March 9, 2010. (NOTIFICATION)

This item although shown for notification purposes was brought up for discussion from

the floor by the employee's attorney, Osnat K. Rind who asked that the Board consider a preliminary issue today involving the disciplinary action of Maurice Mackens.

Chairman de la O asked Attorney Rind to briefly state her issue and the Board would decide whether to hear it today or at a future meeting. Attorney Rind stated that Mr. Mackens filed a timely appeal with the Civil Service Board appealing his termination; however, he received a letter from the Executive Secretary denying his appeal request on the basis of language in his termination letter that stated that if Mr. Mackens breached the agreement, he would give up his right to an appeal. She went on to say that there is an issue as to whether Mr. Mackens breached a cited agreement, so they are asking that he receive a hearing because then the department can raise whatever defenses at the hearing, but for purposes of determining whether there is a breach in cause, they are asking that a hearing be held.

Chairman de la O asked Attorney Rind if her client was asking for a hearing solely on the question of whether Mr. Mackens breached the agreement and therefore forfeited the right to appeal his termination. Attorney Rind responded that if the Board's answer to the question of whether he can appeal the termination is "yes", then obviously the Board could then determine if there was just cause to terminate Mr. Mackens.

Chairman de la O stated that the question is whether the Board sets a hearing to hear both issues at the same time or does the Board hear one issue and if it is a favorable ruling to the employee to then hear the other issue. Attorney Rind responded whatever is the Board's pleasure as to how it wants to proceed, she would comply accordingly.

Chairman de la O asked Assistant City Attorney Min if he wished to address Mr. Mackens' issue today or if he need time to address it [at a future meeting]. Assistant City Attorney Min responded that he could address the matter today. He went on to say that the agreement that Mr. Mackens signed indicated that if he is terminated, he has no rights to appeal to Civil Service, file a grievance, or take any other action.

Chairman de la O asked Assistant City Attorney Min if he had an objection to the Board setting this matter for the next meeting so that Board Members could have a copy of the agreement for review and address the issue of whether Mr. Mackens is entitled to a hearing. Assistant City Attorney Min responded that it is a matter of black and white law which is stated in the AFSCME union, (local 871) contract that Mr. Mackens is not entitled to a hearing because he was terminated. Chairman de la O asked Assistant City Attorney Min again if he had an objection to the Board discussing this issue today. Assistant City Attorney Min responded whatever is the Board's pleasure, he would adhere to it.

Chairman de la O asked if any Board Member objected to hearing this matter today. Hearing none, Chairman de la O stated that the Board would proceed after each Member obtained a copy of the union contract.

Member Silverman asked if the Board would hear testimony. Chairman de la O responded that the majority seemed to think that the matter could be addressed based on the wording of the contract, but he would know for sure as they went along. Attorney Rind responded that the only person she might call to give testimony is AFSCME Union, Local 871 president, Joe Simmons, since he was present. She went on to explain to the Board the process used in the contract for employees who test positive and the discipline received based upon the number of times an employee receives positive drug test results. Attorney Rind stated that the contract required that Mr. Mackens complete the rehabilitation process and failure to do so would result in a breach of contract ultimately resulting in termination. She went on to say that there is an issue of whether Mr. Mackens breached the contract and their position is he did not in accordance with

Article 37.18 of the collective bargaining agreement (CBA). Attorney Rind further stated that the Department Director's letter indicated that Mr. Mackens was terminated because he failed a second drug test and according to the contract, a second positive drug test would result in the employee being suspended for 30 days, but not termination. She stated that their position is that there has been no violation of the agreement which deals with rehab and the CBA which is incorporated therein specifically provides for a 30-day suspension on a second offense.

Member Kaplan asked what the background was of the agreement dated March 23, 2009. Attorney Rind responded that the employee was subjected to a reasonable suspicion drug test and there was a positive result and the City wanted Mr. Mackens to do exactly what the CBA provides for, which was complete a rehabilitation program. She went on to say that Mr. Mackens went through the rehab program and later tested positive for a second random drug test, which calls for a 30-day suspension, but instead, the department terminated him.

Member Kaplan asked if there were any earlier records of abuse. Joe Simmons, Union President, AFSCME-Local 871 responded that this was Mr. Mackens' second offense in total.

For clarification purposes, Chairman de la O asked if this was Mr. Mackens' second positive drug testing under the agreement for which he was terminated. Attorney Rind responded in the affirmative. She went on to say that if it is construed as anything else, then there is no consideration for this agreement between the City and Maurice Mackens because he already had the right under the CBA to go through rehab and to get three shots at testing positive and unfortunately or fortunately that is the agreement between the parties.

Chairman de la O stated that he wanted to make sure he understood Attorney Rind's argument and asked her if it is her argument that according to the provision in the agreement, the City could terminate Mr. Mackens if he failed to go to rehab and that he would also lose his rights to appeal to Civil Service. Attorney Rind stated that for purposes of this hearing, she would respond in the affirmative.

Chairman de la O stated that because Mr. Mackens went through rehab, but now subsequent to the rehab, which is subsequent to complying with the agreement, he had another violation which goes back to Article 37.19 and Attorney Rind's argument is it has to mean that because otherwise what would have been the consideration for the agreement for the employee to waive his rights under Article 37.19 and agree to be fired when that is not what would have happened under the CBA. He went on to say that if the department is going to interpret Article 37 to mean that another (or second violation) means the employee is automatically terminated, then he does not understand why the employee would be giving up rights under the CBA.

Member Kaplan stated that he did not think the employee could give up his rights. Chairman de la O responded that whether he could was another issue, but he would assume that an employee could give up whatever rights they wanted but would get something in return. He went on to say that if Mr. Mackens got something in return, he would think that he would be able to waive his rights but he was not sure what he got in return which is why the Board needs a response from the department's attorney.

Member Kaplan stated that rights are collective and that Mr. Mackens' rights are spelled out in the CBA.

Chairman de la O stated that he would like to give the department's attorney an opportunity to tell the Board what the agreement means. Assistant City Attorney Min

stated that he agreed with Attorney Rind that the agreement is an acknowledgment of Article 37.19 of the CBA.

Member Kaplan stated that it should not be an amendment or change to it, but simply an acknowledgement of its application. Assistant City Attorney Min stated that he could agree with Member Kaplan, but he did not agree with the facts that were proffered. He went on to say that in 2009 Mr. Mackens tested positive on three different occasions and he did not successfully complete the rehabilitation program in accordance with Article 37.11. Assistant City Attorney Min further stated that Article 37.19 states that a termination cannot be appealed to Civil Service, the Grievance Procedure, or any other forum.

Member Silverman stated that each side presented facts that contradict each other so the Board is not in a position to determine who is correct; therefore in order to determine who is correct, it would seem to him that the Board would have to take testimony to determine whether this is Mr. Mackens' first, second, or third positive drug test.

Chairman de la O stated that if both sides do not agree on the issues, there needs to be a hearing. Attorney Rind responded that she understood there needs to be a hearing, but she thought this was just a preliminary issue about whether Mr. Mackens was entitled to have a hearing. She went on to say that if there is a third offense, then maybe under the contract there would be cause to terminate because that is what the CBA calls for; however, whether there has been a breach of the agreement is the preliminary issue.

Member Silverman stated what he meant was Mr. Mackens may or may not be entitled to a hearing depending upon whether this was his first, second, or third positive drug testing. He went on to say that he thinks the Board would need to take testimony to determine what the facts are so if the facts are that this is the employee's second or third positive testing, he may or may not be entitled to a hearing based upon the agreement.

Member Kaplan asked if the Board Members were in agreement that they are talking about the interpretation of the CBA. Member Silverman responded that there is an issue as to the facts since it is the department's position that this is Mr. Mackens' third positive drug testing which would result in termination and that there would be no appeal because he violated the agreement he signed for which he said he would go to rehab and remain clean; however, the employee's position is this is his second positive drug testing and should be suspended for 30 days.

Chairman de la O stated that he partially agreed with Member Silverman's explanation so the gloss he would put over Member Silverman's explanation is that the factual question is whether Mr. Mackens successfully met the requirements of rehabilitation because it is only when an employee fails to meet the requirements of the rehabilitation program that they do not get to appeal. He went on to say that even if Mr. Mackens had a third positive drug test, he thinks he still would be entitled to appellate rights as long as he complied with his rehabilitation.

Member Silverman stated that he thinks it is the department's position that Mr. Mackens violated the requirements of the rehab program because he tested positive.

Assistant City Attorney Min stated that there are two issues, one is that Mr. Mackens violated the rehab agreement by not completing it, (the second is) and that he tested positive three times in 2009 so it is not that he tested positive and therefore violated rehabilitation.

Chairman de la O asked Assistant City Attorney Min if he would agree that had Mr. Mackens completed his rehab, but had a third violation and was terminated that he still would have appellate rights. Assistant City Attorney Min responded in the negative. He went on to say that pursuant to Article 37.18(c) a third positive testing would result in a dismissal and Article 37.19 also states, "If an employee is terminated for failure to meet the rehabilitation or . . ." Chairman de la O stated that he missed the word "or" so Assistant City Attorney Min was correct.

Member Kaplan asked Chairman de la O when he talks about appellate rights was he talking about appellate rights under the (Collective Bargaining Agreement) CBA. Chairman de la O responded that he was talking about appellate rights before the Civil Service Board.

Member Kaplan stated that someone needed to explain to him because he was under the impression that if there was a violation of the CBA, appellate, grievance, or arbitration procedures that the remedy applied would be concerning the violation of the CBA. Chairman de la O responded that Article 37.19 states, "If an employee is terminated for failure to meet the rehabilitation or who tests positive for a third offense shall have no appellate rights through Civil Service, the grievance procedure or any other forum." He went on to say that in essence, all of the appellate rights with regards to the third violation are contained in Article 37 which is the confirmatory test.

Chairman de la O asked Attorney Rind if it is her position that this is Mr. Mackens' second violation and that he successfully completed the rehabilitation. Attorney Rind responded in the affirmative. She went on to say that not only is that their position, but Mr. Mackens was not terminated for failing to complete the rehabilitation program because that is not what the letter of termination says rather it says specifically that he is being terminated because he had another positive drug test.

Chairman de la O stated that he would assume that Mr. Mackens had a positive drug test result while the rehabilitation program was already over, but Assistant City Attorney Min does not agree that Mr. Mackens' rehabilitation was over yet. Assistant City Attorney Min responded that was not what he said rather he said that was not the sole reason Mr. Mackens' rehabilitation was not successfully completed.

Chairman de la O asked Assistant City Attorney Min why he said that Mr. Mackens' rehabilitative program was not successfully completed. Assistant City Attorney Min responded that he did not follow through with the after care as per the CBA.

Chairman de la O asked what Mr. Mackens was supposed to do during the after care. Assistant City Attorney Min responded that it was difficult for him to go into the matter because of confidentiality issues but he could say that there was a counselling requirement that needed to be met by Mr. Mackens. Chairman de la O asked how there could be confidentiality when Mr. Mackens was appealing the termination (in an open forum). Assistant City Attorney Min responded that he was not quite sure who was making the argument because Mr. Mackens has not said anything in his defense and the only persons who have spoken on this issue in defense of Mr. Mackens were Attorney Rind and Union President Joe Simmons. He went on to say that this matter was not on today's agenda for discussion and he does not believe a waiver has been written so he does not know what Mr. Mackens has to say on the issue.

Chairman de la O asked Assistant City Attorney Min is it an issue of whether Mr. Mackens did all of the after care he was supposed to do which is the reason there is a violation of the rehab requirement and that there is a third violation either of which would remove Mr. Mackens from having any appellate rights.

Member Kaplan stated that Article 37.19 says that if certain facts occur, then the employee does not have appellate rights under the CBA which he understands, but the facts need to be established so he wants to know if the facts would be heard before an arbitrator or before the Civil Service Board. Chairman de la O stated that it appeared that the employee chose this forum (Board).

Attorney Rind stated that in every case where there is a disciplinary action for all of the unions, they have a choice of forum for which they can either come before the Civil Service Board, the Grievance Procedure, or Arbitration. She went on to say that in either forum whether they choose one or the other, the terms of the CBA are certainly a part of what the Board and/or Arbitrator would consider in determining whether there was cause for the discipline and the Board has in Rule 14 the general provision for cause.

Member Kaplan stated that Attorney Rind's explanation cleared up his understanding.

Following discussion, the Board entered a motion to grant a hearing to determine whether there was a violation of the rehabilitation agreement and/or whether this was a third violation which resulted as follows:

Motion by Member Kaplan, seconded by Member Silverman, that this matter be APPROVED. PASSED by the following vote.

Aye: Chairperson de la O, Dames, Scarola, Silverman and Kaplan

An Investigation hearing will be scheduled regarding this matter.

E. GENERAL ITEMS

F. REPORTS

F.1 Pending Hearings as of April 6, 2010. (NOTIFICATION)

PRESENTED

G. REQUESTS FOR HEARINGS

H. TODAY'S HEARINGS

H.1 Hearing of appeal on behalf of Pedro C. Torres, Automotive Equipment Operator II, relative to his 3-day suspension, effective September 20, 2007.

Prior to hearing Mr. Torres' case, Chairman de la O informed the attorneys that he had an appointment at 1:00 P.M., which would leave three hours to hear Mr. Torres' case. He went on to that there was a strong possibility that today might be his last meeting and it is his guess (given the number of expected witnesses) that the Board may not finish the case today. Chairman de la O asked Special Counsel Everett what would happen if he sat for part of the hearing and he resigned prior to finishing the case? Cynthia A. Everett, Special Counsel to the Board responded that if the Chairman was not present [because of his resignation] and there was a quorum of Board Members who heard the matter, they still could vote on the charges.

The Board entered into the appeal hearing of Pedro C. Torres, the Appellant.

Barnaby Min, Assistant City Attorney (ACA), represented the Department.

Teri Guttman-Valdes, Attorney at Law, represented the Appellant.

Both attorneys presented opening statements.

All witnesses were sworn in individually. Witnesses for the Department appeared in the following order:

1. Rommel Viera, Mason, City of Miami, Department of Public Works

Questions were posed by Board Members Dames and Kaplan during the testimony of witness Viera.

2. David Hernandez, Street Lighting Engineer, City of Miami, Department of Public Works

Questions were posed by Board Members Dames and Kaplan during the testimony of witness Hernandez.

The Department rested its case.

Witnesses for the Appellant appeared in the following order: Pedro C. Torres, Automotive Equipment Operator II, City of Miami, Department of Public Works, testified on his own behalf.

Questions were posed by Board Member Dames during the testimony of witness Torres.

The Appellant rested his case. The Department waived rebuttal testimony and both attorneys presented closing arguments.

Following final argument, Member Kaplan reviewed the City's Workplace Violence Policy and stated that it appeared to him that the (Appellant's) disciplinary letter dated September 19, 2007 issued by Stephanie Grindell (former Department Director) which outlined the discipline and the reason for the discipline was lacking in that it did not make reference to a threat of violence in a description of the conduct that was being discussed by the director in her letter, although the charging document does indicate that threats of violence are prohibited. He went on to say that there was discussion about the getting of a gun by the Appellant, but no reference was made to this (allegation) in the reprimand and the action that is described as the violation of the Civil Service Rules is essentially a violation of workplace violence which is defined as violence or threat of violence by any employee against another employee. Member Kaplan further stated that zero tolerance is not mentioned, but the Board has to assume that it runs over all of the acts of violence, but the issue of the gun was not referred to in the disciplinary letter; therefore, there was nothing the Board could rely upon to charge misconduct by the employee so what he would do is go to the allegation of violence and say to himself as one person making the decision: Is it appropriate for and is it an act of violence for somebody to defend themselves when they think they are being attacked by someone with a sledge hammer? He stated in that regard, he did not think it was an act of violence.

Member Scarola stated that he is aware that the Workplace Violence Policy calls for

zero tolerance of violence, but he just finds it very hard to believe that if an employee was standing with a deadly weapon and according to the policy, the only way that the other person could defend himself is to notify a supervisor is ludicrous. He went on to say that he understands that the City does not want any incidents occurring between employees, but the City has to face the reality that one employee is going to be the aggressor and the other the defender. Member Scarola further stated that they are taught in the Police Academy about the 21-foot Rule, which is the aggressor could be upon the defender at this distance before the defender could take any sort of defensive action to avoid the threat so he thinks there needs to be a "self-defense exception" provision included in the Workplace Violence Policy.

Following discussion, the Board entered a motion to find the Appellant NOT GUILTY of the following three charges listed in the charging document:

- Civil Service Rule 14.2(h) - Has been guilty of actions which amount to insubordination or disgraceful conduct whether committed on duty or off;

- Civil Service Rule 14.2(i) - Has been wantonly offensive in conduct or language toward the public or City officers or employees;

- Administrative Policy 1-99 - Workplace Violence

Under discussion, Member Dames stated that he read the witnesses' statements which seemed to center around Jorge Torres grabbing a sledge hammer trying to hit Pedro Torres and that Jorge Torres admitted in his statement, that he went after Pedro Torres and the fight started so he thinks Pedro Torres was defending himself.

Chairman de la O stated that the Board has had this discussion before and agreed that there must be a self-defense section addressed in the policy for no other reason than because you cannot abrogate the common law which is everyone has the right to defend themselves, and the policy makes no reference to there being a self-defense exception.

Member Silverman stated that all Pedro Torres had to do was walk away rather than engage in the violence and if he had done so, it would have been the end of the matter.

Following discussion, the motion on the floor to find the Appellant NOT GUILTY of all of the charges 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, Scarola and Kaplan

No: Silverman

Following the Board's vote on the motion, Chairman de la O instructed Special Counsel Everett to include in the findings that he agreed with Member Kaplan's view on the charges as they related to there being no actions spelled out in the reprimand to support the violations. He went on to say that originally he was going to vote guilty on all of the charges because of the threat of violence and because he did not believe that David Hernandez had a reason to lie about what he heard, so he thought Pedro Torres' conduct after the fight was disgraceful and he had engaged in a threat of violence, but since [the action of a] threat of violence was not charged in the disciplinary letter, the Board should not consider it nor should the Appellant have been charged with violating the policy.

H.2 Hearing of appeal on behalf of Shekita Johnson, Communications Operator, relative to her 8-hour suspension, effective February 8, 2009.

Osnat K. Rind, Attorney on behalf of Shekita Johnson, asked that her client's hearing be continued.

Chairman de la O asked for the department's position on the employee's request. Assistant City Attorney Min responded that he had no objection to the continuance request.

Chairman de la O asked if this was the first continuance requested by the employee. The Executive responded in the negative. She went on to say that this was the second continuance requested by the employee.

Following discussion, the Board entered a motion to grant the employee's request for a CONTINUANCE which resulted as follows:

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

Aye: Chairperson de la O, Dames, Scarola, Silverman and Kaplan

H.3 Hearing of appeal on behalf of Luis Hernandez, Police Officer, relative to his 40-hour suspension, effective March 6, 2009.

Assistant City Attorney Min stated that he would ask that this hearing be continued because his witness is ill.

Chairman de la O asked opposing counsel if she had an objection to the continuance request. Attorney Rind responded in the negative.

Chairman de la O asked for the scheduling history of Officer Hernandez' case. The Executive Secretary responded that this is the first time the hearing was scheduled and the first continuance requested by the department.

Following discussion, the Board entered a motion to grant the department's request for a CONTINUANCE 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, Scarola, Silverman and Kaplan

ADJOURNMENT:

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

Motion by Member Silverman, seconded by Member Dames, to APPROVE. PASSED by the following vote.

Aye: Chairperson de la O, Dames, Scarola, Silverman and Kaplan

The meeting adjourned at 12:13 P.M. A break was taken at 10:38-10:53 A.M.

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary