

# **City of Miami**

*City Hall  
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## **Meeting Minutes**

**Tuesday, April 20, 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 10:05 a.m. The roll call for the Board Members at the commencement of the meeting was as follows:*

**Present:** Chief Examiner Scarola, Chief Examiner Kaplan and Member Silverman

**Absent:** Chairperson de la O and Member Dames

**NOTE:** Member Dames arrived at approximately 10:09 a.m. and a second roll call took place which identified all members as being present with the exception of Chairman de la O; therefore, Member Scarola chaired the meeting.

**A. APPROVING THE MINUTES OF:**

Regular Meeting of April 6, 2010.

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

**Aye:** Scarola, Silverman and Kaplan

**Absent:** Chairperson de la O and Dames

**B. PERSONNEL MATTERS**

- B.1** A copy of a memorandum from Carlos Migoya, City Manager, notifying Magdalena Moradel, Community Service Provider of her return to former classification. Magdalena Moradel is being rolled back to Typist Clerk II. (NOTIFICATION)  
**NOTIFIED**
- B.2** Copy of a memorandum from Carlos Migoya, notifying Jeffrey H. Campos, Crime Scene Investigator I, of his return to former classification. Jeffrey H. Campos is being rolled back to Public Service Aide. (NOTIFICATION)  
**NOTIFIED**
- B.3** Copy of a memorandum from Carlos Migoya, notifying Jacqueline F. Exceus, Crime Scene Investigator I, of her return to former classification. Jacqueline F. Exceus is being rolled back to Public Service Aide. (NOTIFICATION)  
**NOTIFIED**
- B.4** Copy of a memorandum from Carlos Migoya, notifying Joseph Pontillo, Technical Support Analyst, of his return to former classification. Joseph Pontillo is being rolled back to Information Technology Technician III. (NOTIFICATION)  
**NOTIFIED**

- B.5** A copy of a letter from Carlos Migoya, City Manager, notifying Khristopher G. Vinson, Public Service Aide, of his layoff, effective April 14, 2010 and that his name will be placed on a "Layoff" register for a period of no more than 36 months. (NOTIFICATION)

**NOTIFIED**

- B.6** A copy of a letter from Carlos Migoya, City Manager, notifying Tatayana E. Harris, Public Service Aide, of her layoff, effective April 14, 2010 and that her name will be placed on a "Layoff" register for a period of no more than 36 months. (NOTIFICATION)

**NOTIFIED**

- B.7** A copy of a letter from Carlos Migoya, City Manager, notifying Melanie Ortiz, Typist Clerk II, of her layoff, effective April 14, 2010 and that her name will be placed on a "Layoff" register for a period of no more than 36 months. (NOTIFICATION)

**NOTIFIED**

- B.8** A copy of a letter from Carlos Migoya, City Manager, notifying Stanley Dubuisson, Public Service Aide, of his layoff, effective April 14, 2010 and that his name will be placed on a "Layoff" register for a period of no more than 36 months. (NOTIFICATION)

**NOTIFIED**

**C. MILITARY LEAVES OF ABSENCE**

**D. DISCIPLINARY MATTERS**

- D.1** Copy of letter from Chief John F. Timoney, Director, Department of Police, notifying Jean Marie Jean-Philippe, Police Officer, of his 80-hour suspension, effective March 29, 2010 and a copy of a request from Officer Jean-Philippe requesting a hearing of appeal relative to his 40-hour suspension. A hearing will be scheduled in accordance with the Civil Service Rules and Regulations. (NOTIFICATION).

**RECEIVED AND FILED**

- D.2** Copy of a letter from Chief Miguel A. Exposito, Director, Department of Police, notifying Jeffrey Jans, Police Officer, of his 80-hour suspension, effective April 13, 2010 and a copy of a request to appeal from Officer Jans. A hearing will be scheduled in accordance with Civil Service Rules and Regulations. (NOTIFICATION)

**RECEIVED AND FILED**

- D.3** Copy of a letter from Chief Miguel Exposito, Director, Department of Police,

notifying Marcel Jackson, Police Officer, of his 40-hour suspension, effective April 13, 2010 and a request from Marcel Jackson, requesting a hearing of appeal relative to his 40-hour suspension. A hearing will be scheduled in accordance with Civil Service Rules and Regulations. (NOTIFICATION)

**RECEIVED AND FILED**

- D.4** Copy of a letter from Chief Miguel A. Exposito, Director, Department of Police, notifying Magdiel Perez, Police Officer, of her 40-hour suspension, effective April 14, 2010. (NOTIFICATION)

**NOTIFIED**

- D.5** Copy of letter from Chief Miguel A. Exposito, Director, Department of Police, notifying Ivan Moreno, Police Officer, of his 10-hour forfeiture, effective March 24, 2010. (NOTIFICATION)

**NOTIFIED**

- D.6** Copy of a letter from Chief Miguel A. Exposito, Director, Department of Police, notifying Ricardo Martinez, Police Officer, of his 10-hour suspension, effective April 9, 2010. (NOTIFICATION)

**NOTIFIED**

**E. GENERAL ITEMS**

- E.1** Copy of Findings of Fact concerning the appeal hearing of Pedro C. Torres, Automotive Equipment Operator II, relative to his 3-day suspension, effective September 20, 2007. (DISCUSSION)

*Member Silverman stated that the Board's vote was not included in the Findings of Fact; however, it was his understanding that the Board's position would be included.*

*Chairman Scarola responded that the Board did approve a motion to include the Board's vote in the Findings of Fact at an earlier meeting and therefore called for a motion to include the Board's vote under the Conclusion of Law section of the Findings of Fact. The motion resulted as follows:*

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

**Aye:** Scarola, Silverman and Kaplan

**Absent:** Chairperson de la O and Dames

*The Board entered a motion to APPROVE the Findings of Fact as amended which resulted as follows:*

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

**Aye:** Scarola, Silverman and Kaplan

**Absent:** Chairperson de la O and Dames

**F. REPORTS**

F.1 Pending Hearings as of April 20, 2010. (NOTIFICATION)

**PRESENTED**  
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**Following Member Dames' arrival, a second roll call took place which resulted as follows:**

**Present:** Chief Examiner Scarola, Member Dames, Chief Examiner Kaplan and Member Silverman

**Absent:** Chairperson de la O

**G. REQUESTS FOR HEARINGS****H. TODAY'S HEARINGS**

H.1 Hearing of appeal on behalf of Alice Dunn, Typist Clerk II, relative to her 40-hour suspension, effective August 11, 2008.

*Assistant City Attorney Min informed the Board that he and Attorney Rind agreed to hear Ms. Dunn's two cases (Items H.1 and H.2) together since the witnesses are the same in both cases with the exception of Ms. Offyr Martinez who would only be called to testify in this case.*

*Chairman Scarola asked opposing counsel for her position on hearing both cases together. Attorney Rind responded that she had no objection; however, she would ask to invoke the Rule of Witnesses.*

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*The Board entered into the scheduled appeal hearing of Alice Dunn, the Appellant.*

*Barnaby Min, Assistant City Attorney (ACA), 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. Witnesses for the Department appeared in the following order:*

- 1. Offyr Martinez, Typist Clerk III/Supervisor, City of Miami, Department of Police.*
- 2. Cherise Gause, Police Sergeant, City of Miami, Department of Police.*

*Questions were posed by Board Members Kaplan, Scarola, and Dames during the testimony of witness Cherise Gause.*

- 3. Kathy Lampkin, Typist Clerk III, City of Miami, Department of Police.*

*Questions were posed by Board Members Scarola, Kaplan, and Dames during the testimony of witness Kathy Lampkin.*

- 4. Alice Dunn (Appellant), Typist Clerk II, City of Miami, Department of Police.*

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

*The Department rested its case.*

*The Appellant called no witnesses, but entered exhibits into evidence and rested her case. Afterwards the Board proceeded to closing argument that was presented by both attorneys.*

*Following final argument, the Board entered a motion to vote on each charge individually which resulted as follows:*

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

**Aye:** Scarola, Dames, Silverman and Kaplan

**Absent:** Chairperson de la O

*The Board entered a motion to find the Appellant GUILTY of Charge #1 - Departmental Order 1.11.6.13.12 - Obeying and Executing Orders.*

*Under discussion Member Silverman stated that the department cited six charges in the reprimand issued to Ms. Dunn; however, in his opinion, the department vastly overcharged her with rule violations because this was a simple case. He went on to say that as far as the merits, it was clear to him that Ms. Dunn decided that she would make up her own hours and it did not matter to her as long as she got approval later on from her supervisor. He went on to say that an organization cannot run an operation where an employee takes it upon herself to decide when to come in and when to leave work because the City of Miami is not a one-person operation, but a large entity. Member Silverman further stated that Ms. Dunn admitted that she altered the original agreement that Supervisor Lampkin approved without permission and that she accepted the imposed discipline issued by the department; therefore, Ms. Dunn's admission made her responsible under this one charge, but he did not believe she was responsible under the remaining charges.*

*Member Kaplan stated that if the charge (Departmental Order 1.11.6.13.12) is read clearly, Ms. Dunn had the responsibility of promptly and cheerfully executing the orders of relations with the public, members and civilian employees in order to bring the most effective performance of her duties as required by the Police Department. He went on to say that all of the witnesses' testimony specifically of Ms. Dunn was that she did not benefit by payment of overtime to her [or that] she came in and altered the time that she had to work in order to accommodate her own personal great need, but mostly to do her job which she did efficiently for 26 years so there was no way that the charge of obeying and executing orders of superiors could possibly be interpreted as the wrongdoing of this employee.*

*Member Dames stated that he was torn [as to which way he should vote]. He went on to say that according to Ms. Dunn's memos, she owned up to everything that transpired at the time she altered her time. Member Dames further stated that he believed Ms. Dunn's supervisor granted her the first four hours to work prior to her normal shift on October 15, 2007, but then she took it upon herself to work an additional four hours which is the reason she reported to work the night before [October 14, 2007] at 10:00 P.M. instead of following the approved arrangement of starting work at 2:00 A.M. on October 15, 2007 to make up her time. He stated that Ms. Dunn admitted that she altered her work hours without prior approval from her supervisor and she was wrong by doing so, but at the end of the day the supervisor approved her request.*

*Member Kaplan stated that when Ms. Dunn altered her work schedule, she thought she was doing right.*

*Chairman Scarola stated that his concern was the discipline issues - were the questionings of what happened almost immediately after the occurrences started; and if there was a memo that Ms. Dunn produced, he thought that would have been something she would have held tightly up until today, because the incident was dated the early part of October 2007 and the reprimand was written on October 15, 2007. He went on to say that the position is the department (Records Unit) has to work within a time frame and members need to report at specific times; however, he would go as far as to question the supervisors' practice of allowing employees to come in to work and swap this time for a day off. He stated that Ms. Dunn did ask permission to make up 8 hours so that she could be off on a Thursday, but then Ms. Dunn took it upon herself to work 16 hours instead so that she would not have to work on that Thursday and Friday.*

*Member Kaplan stated that he wished to comment on the Chairman's observation about his belief that Ms. Dunn should have maintained a copy of the written memo approving her behavior. He went on to say that the burden was on the City to produce the document or to bring in witnesses to testify that they never received the document, but that did not happen and as a consequence all the Board had was an employee who gave the document to her supervisor and an attorney who requested a copy but only received silence from the City. Member Kaplan further stated the only conclusion the Board could reach was that the City did receive the document and because it was contrary to their own position in this case they did not produce it, which was their right because they did not have to produce it except for some violation of the State Law on public records, but significantly for the purpose of this case, the Board could not interpret what occurred in this matter regarding the document adverse to the employee, which was wrong.*

*Member Scarola stated as he recalled the testimony, one witness did testify that she received the document and that the supervisor never approved the changing of the hours from the original agreement.*

*Following discussion, the motion on the floor to find the Appellant GUILTY of the Charge #1 resulted as follows:*

**Motion by Member Silverman, seconded by Member Dames, that this matter be APPROVED. FAILED by the following vote.**

**Aye:** Scarola and Silverman

**No:** Dames and Kaplan

**Absent:** Chairperson de la O

*The motion having failed, the Board entered a motion to find the Appellant NOT GUILTY of Charge #1 which resulted as follows:*

**Motion by Member Kaplan, seconded by Member Dames, that this matter be APPROVED. FAILED by the following vote.**

**Aye:** Dames and Kaplan

**No:** Scarola and Silverman

**Absent:** Chairperson de la O

*The motion having failed, Chairman Scarola suggested that the Board revisit Charge #1 after consideration of the remaining charges. Chairman Scarola called for a motion on Charge #2.*

*The Board entered a motion to find the Appellant NOT GUILTY of Charge #2 - Departmental Order 6.1.4.6.2 - Permission to Work Overtime. The motion resulted as follows:*

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

**Aye:** Scarola, Dames, Silverman and Kaplan

**Absent:** Chairperson de la O

*The Board entered a motion to find the Appellant NOT GUILTY of Charge #3 - Departmental Order 6.1.4.1 - Employee Attendance Repot.*

*Under discussion, Member Kaplan read into the record the bold-faced sentence cited in Departmental Order 6.1.4.1 which states, "All adjustments to regularly scheduled work hours must have the advance approval of a member's immediate supervisor." He stated that in his opinion it was clear that there was no advance approval from the supervisor but he did believe that the requirement of advance approval could be waived in the event there was subsequent approval or the genuine, honest and sincere belief in the mind of the employee that she got approval as a result of prior contact, etc. Member Kaplan further stated that this order should not be read strictly without the Board taking into consideration the history of the employee's testimony in this case which is Ms. Dunn got approval although it was not advanced approval from her supervisor and that it ought to be read as proof there was no violation of this rule otherwise the Board would be strictly interpreting all of its rules and that does not happen.*

*Member Dames stated that the employee worked overtime although she did not request to be paid; however, he felt that overtime should have applied in her case so it appeared to him that the department violated its own rules and not Ms. Dunn.*

*Following discussion, the motion on the floor to find the Appellant NOT GUILTY of Charge #3 resulted as follows:*

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

**Aye:** Scarola, Dames, Silverman and Kaplan

**Absent:** Chairperson de la O

*The Board entered a motion to find the Appellant NOT GUILTY of Charge #4 - Civil Service Rule 14.2(e)(1) - Act of Insubordination which resulted as follows:*

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

**Aye:** Scarola, Dames, Silverman and Kaplan

**Absent:** Chairperson de la O

*The Board entered a motion to find the Appellant NOT GUILTY of Charge #5 - Civil Service Rule 14.2(e)(2) - Serious Breach of Proper Discipline, which resulted as follows:*

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



**Aye:** Dames, Silverman and Kaplan

**No:** Scarola

**Absent:** Chairperson de la O

*The Board entered a motion to find the Appellant NOT GUILTY of Charge #6 - Civil Service Rule 14.2(k) - Incompetent /Negligent which resulted as follows:*

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

**Aye:** Scarola, Dames, Silverman and Kaplan

**Absent:** Chairperson de la O

*Following the Board's vote on all of the charges, Chairman Scarola asked if the Board needed to redress the first charge for which there was a tie vote. Special Counsel Everett responded that the Board needed to address the first charge to the extent there was a willingness or likeliness of there being a change of opinion on the vote.*

*Member Dames stated that he was agreeable to changing his vote because Ms. Dunn admitted that she took it upon herself to make up an additional four hours that was not pre-approved by her supervisor and since she did not get prior authorization to do so, he was changing his not guilty vote to guilty.*

*Following discussion, the Board entered a motion to find the Appellant GUILTY of Charge #1 - Departmental Order 1.11.6.13.12 - Obeying and Executing Orders, which resulted as follows:*

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

**Aye:** Scarola, Dames and Silverman

**No:** Kaplan

**Absent:** Chairperson de la O

*The Board entered into the Penalty Phase of the hearing and reviewed the Appellant's personnel file.*

*The Attorneys offered no witness testimony or evidence during the penalty portion of the Appellant's hearing. The Board entered a motion to recommend to the City Manager that the Appellant receive a 10-hour suspension which resulted as follows:*

**Motion by Member Silverman, seconded by Chief Examiner Scarola, that this matter be APPROVED. FAILED by the following vote.**

**Aye:** Scarola and Silverman

**No:** Dames and Kaplan

**Absent:** Chairperson de la O

*The motion having FAILED, the Board entered a motion to recommend to the City Manager that the Appellant receive a reprimand only which resulted as follows:*

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

**Aye:** Scarola, Dames and Kaplan

**No:** Silverman

**Absent:** Chairperson de la O

## H.2

Hearing of appeal on behalf of Alice Dunn, Typist Clerk II, relative to her 80-hour suspension, effective August 18, 2008.

*The Board entered into the appeal hearing of Alice Dunn, the Appellant.*

*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.*

*Witnesses for the Department appeared in the following order:*

1. *Cherise Gause, Police Sergeant, City of Miami, Department of Police.*

*Questions were posed by Board Members Kaplan, Scarola, and Dames during the testimony of witness Cherise Gause.*

2. *Kathy Lampkin, Typist Clerk III, City of Miami, Department of Police.*

*Questions were posed by Board Members Scarola, Kaplan, and Dames during the testimony of witness Kathy Lampkin.*

3. *Alice Dunn, Typist Clerk II, City of Miami, Department, testified on her own behalf.*

*Questions were posed by Board Members Dames and Kaplan during the testimony of witness Alice Dunn.*

*The Department rested its case.*

*The Appellant called no witnesses, but entered exhibits into evidence and rested her case.*

*Following final argument during the fact finding phase of the Appellant's hearing, the Board entered a motion to vote on the charges separately which resulted as follows:*

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

**Aye:** Scarola, Dames and Silverman

**No:** Kaplan

**Absent:** Chairperson de la O

*The Board entered a motion to find the Appellant GUILTY of Charge #1 - Departmental Order 1.11.6.29.1 - Absence Without Leave. The motion DIED FOR LACK OF A SECOND. The motion having died, the Board entered another motion to find the Appellant NOT GUILTY of Charge #1 which resulted as follows:*

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

**Aye:** Scarola, Silverman and Kaplan

**No:** Dames

**Absent:** Chairperson de la O

*The Board entered a motion to find the Appellant GUILTY of Charge #2 - Departmental Order 1.11.6.13.12 - Obeying and Executing Orders.*

*Under discussion, Member Silverman read into the record Ms. Dunn's response [memo dated November 29, 2007] to the reprimand which stated, "I am in violation of Departmental Order 1.11.6.13.12 which is disobeying an executed order of my superior." He stated that Ms. Dunn admitted that she was in violation of this order therefore he submits that the Board should find her guilty only on this charge.*

*Chairman Scarola stated his concern is this incident occurred two days after the first incident and although she did call in concerning her tardiness, she tried to stay after work without permission to make up her time. He went on to say that personally he would have made sure to dot all of his "I's" and cross all of his "T's" very closely with the incidents occurring back and forth. Chairman Scarola further stated that Ms. Dunn's tour of duty ended at 2:30 P.M.; however, she remained until 3:30 P.M. and was told to leave because she was not allowed to make up the time she missed that morning*

*Member Dames stated that had Ms. Dunn put up a fuss and refused to leave when asked to do so at 3:30 P.M., he could agree that she was in violation of this charge but that was not the case because when Ms. Dunn was asked to leave, she packed her things and she left.*

*Member Kaplan called the Board's attention to the last clause in the order which states, ". . . to promptly and cheerfully execute the orders of relations with the public, members and civilian employees of the Department, and official agencies in order to bring the most effective performance of their duties as required by the Police Department." He went on to say that to find an employee in violation of this rule, the Board would have to find that the employee acted in a way which was not conducive to making an effective performance of her duties as required by the Police Department and according to what was presented by the department, there was not a shred of evidence to show that Ms. Dunn did not perform her duties effectively.*

*Following discussion, the motion on the floor to find the Appellant GUILTY of Charge #2 resulted as follows:*

**Motion by Member Silverman, seconded by Chief Examiner Scarola, that this matter be APPROVED. FAILED by the following vote.**

**Aye:** Scarola and Silverman

**No:** Dames and Kaplan

**Absent:** Chairperson de la O

*The motion having failed, the Board entered a motion to find the Appellant NOT GUILTY of Charge #2 which resulted as follows:*

**Motion by Member Dames, seconded by Member Kaplan, that this matter be APPROVED. FAILED by the following vote.**

**Aye:** Dames and Kaplan

**No:** Scarola and Silverman

**Absent:** Chairperson de la O

*Chairman Scarola suggested that the Board revisit this charge after consideration of the remaining charges since the Board could not reach a consensus.*

*Chairman Scarola called for a motion on Charge #3 - Departmental Order 6.1.4.6.2 - Permission to Work Overtime. The Board entered a motion to find the Appellant NOT GUILTY of this charge which resulted as follows:*

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

**Aye:** Dames, Silverman and Kaplan

**No:** Scarola

**Absent:** Chairperson de la O

*The Board entered a motion to find the Appellant NOT GUILTY of Charge #4 - Departmental Order 6.1.4.1 - Employee Attendance Report which resulted as follows:*

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

**Aye:** Dames, Silverman and Kaplan

**No:** Scarola

**Absent:** Chairperson de la O

*The Board entered a motion to find the Appellant NOT GUILTY of Charge #5 - Civil Service Rule 14.2(e)(1) - Act of Insubordination which resulted as follows:*

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

**Aye:** Scarola, Dames, Silverman and Kaplan

**Absent:** Chairperson de la O

*The Board entered a motion to find the Appellant NOT GUILTY of Charge #6 - Civil Service Rule 14.2(e)(2) - Breach of Proper Discipline which resulted as follows:*

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

**Aye:** Dames, Silverman and Kaplan

**No:** Scarola

**Absent:** Chairperson de la O

*The Board entered a motion to find the Appellant NOT GUILTY of Charge #7 - Civil Service Rule 14.2(k) - Is Incompetent/Negligent which resulted as follows:*

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

**Aye:** Scarola, Dames, Silverman and Kaplan

**Absent:** Chairperson de la O

*Chairman Scarola directed the Board's attention back to Charge #2 - Departmental Order 1.11.6.13.12 - Obeying and Executing Orders for discussion to determine if they could reach a consensus on this charge.*

*Under discussion Chairman Scarola stated that he thought it was quite clear that Ms. Dunn had been told on several occasions prior to the incident date as to what her duty hours were and she was also told that any changes to her work schedule had to be approved by her supervisor. He went on to say that on the day in question Ms. Dunn was late for work and she called in one hour and 15 minutes late and when she arrived at work, she did not ask if she could make up the time rather she continued working after her tour of duty without permission from a supervisor. Chairman Scarola further stated that this was the same issue she had previously for which she was told not to change her hours without first getting permission, but she ignored this directive which is the reason he voted to find Ms. Dunn guilty of this charge.*

*Following discussion, the Board entered a motion to find the Appellant GUILTY of Charge #2 - Departmental Order 1.11.6.13.12 - Obeying and Executing Orders which resulted as follows:*

**Motion by Member Silverman, seconded by Chief Examiner Scarola, that this matter be APPROVED. FAILED by the following vote.**

**Aye:** Scarola and Silverman

**No:** Dames and Kaplan

**Absent:** Chairperson de la O

*The Chairman called for more discussion and the Board Members presented their position on this charge and as a result, Member Dames stated that he wished to change his vote.*

*Following discussion, the Board entered a motion to find the Appellant GUILTY of Charge #2 - Departmental Order 1.11.6.13.12 - Obeying and Executing Orders which resulted as follows:*

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

**Aye:** Scarola, Dames and Silverman

**No:** Kaplan

**Absent:** Chairperson de la O

*The Board proceeded to the Penalty Portion of the Appellant's hearing.*

*The Board reviewed the Appellant's personnel file and afterwards proceeded to closing argument. Following final argument by both attorneys on the penalty, the Board entered a motion to recommend to the City Manager that the Appellant receive a reprimand only in lieu of the 80-hour suspension recommended by the Police Department which resulted as follows:*

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

**Aye:** Scarola, Dames, Silverman and Kaplan

**Absent:** Chairperson de la O

### H.3

Grievance Hearing on behalf of Cornelius Pierre, Code Enforcement Inspector, regarding violation of Civil Service Rule 12.

*Osnat K. Rind, Attorney at Law, represented the Grievant.*

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

*Prior to getting into the merits of the case, Attorney Rind stated that she and opposing counsel stipulated to the facts and that they would be presenting argument and exhibits only during the hearing.*

*Chairman Scarola asked Attorney Rind to state her case. Attorney Rind responded by saying there had been a layoff in the classification of Code Enforcement Inspector. She went on to say that her client entered the position of Code Enforcement Inspector on November 26, 2007 and that his seniority score according to the City's use of Civil Service Rule 12.1(3)(c) equated to 2.3 which resulted in him being laid off. Attorney Rind further stated that Code Enforcement Inspector Adan Fermin's hire date was March 17, 2008 and that he also had a layoff score of 2.3 according to the City's calculations. She stated that the reason for the equal layoff score [of Code Enforcement Inspectors Pierre and Fermin] was that Mr. Pierre had a score of 2.7 but the City reduced his number of seniority credits by .4 (.1 credit reduction for each month that he was without pay) because he took 1.9 hours leave without pay on February 27, 2008, March (2 hours leave without pay), April (5 hours leave without pay), May (1 hour leave without pay) and that he took off some time in December 2009 without pay for which she did not know the number of hours. Attorney Rind went on to say that she originally presented this argument and they still stand by it which is, whether an employee is on leave without pay or because of vacation, sick, or family medical leave that should not be a factor in calculating seniority credit because the employee remains employed whether he/she is on vacation with pay, or at home sick for one hour, or is carried without pay for the time spent repairing a flat tire while on the way to work. She further stated that Rule 12.1(3)(c) should be interpreted to mean that if an employee was hired on November 1, 1980, the months of service would be calculated beginning with the first of each month. Attorney Rind stated that she pointed out particular places in the Civil Service Rules that describe the penalty an employee would suffer if on a leave without pay (i.e. Rule 15.1(c) points out that if a probationary employee is on leave without pay, the employee's probationary period would be extended the same length of the leave, Rule 8.14 states concerning employees wanting to sit for a promotional exam that they must have continuous, satisfactory service and if an employee is suspended, this would cut the employee's service for purposes of not being allowed to sit for a promotional exam.) She went on to say that the City argued its position and presented its interpretation of Rule 12.1(3)(c) which was not truly advocated by either side [although] both sides did recognize that what was occurring was absurd especially when an employee is without pay for one hour due to illness and loses an entire month of seniority credit. Attorney Rind further stated that the Board had already made a ruling, which they are willing to live by and that they are asking that the Board grant this grievance and instruct the City to go back and calculate the seniority scores in the manner in which the Board has already described.*

*Chairman Scarola asked ACA Min for his position in this matter. ACA Min responded that he agreed with almost everything Attorney Rind related to the Board. He went on to say that Rule 12.1(3)(c) states that an employee receives seniority credit only when they work a full month of service and if the employee fails to work a full month the employee would not be credited for the month regardless of the amount of time they were without pay. He stated that in the past he asked the Board for its definition of a month and with no disrespect to the Board, the definition that it did come up with made no sense because what was suggested by the Board was to total up the time an employee was without pay [within a said classification] and if the time totalled more than 173.3 hours, one tenth [.1] of seniority credit would then be deducted from the employee's seniority*

score, but that is not what Rule 12.1(3)(c) indicates. ACA Min went on to say that Rule 12.1(3)(c) indicates nothing about deductions of time rather that an employee would be awarded seniority credit for every full month of service.

Member Dames stated that ACA Min asked the Board to assist him with interpreting Rule 12 and when it did he was not satisfied with the outcome.

Chairman Scarola stated, so that everyone was clear, it was the City Manager who did not accept the Board's recommendation on the interpretation of Rule 12. He went on to say that he thought the Board was on the right track, but went a little off course; however, he wanted to hear more of ACA Min's argument because he was going to offer something similar that he thought the City Manager might accept.

ACA Min stated that the interpretation the City has been applying and what he is advocating for is if there is leave without pay within the full month of service, the employee would not get credit for that month because of not being in pay status for a portion of the month. He went on to say that as suggested by this Board previously, the Federal mandate of the number of hours worked in a month is 173.3 hours so rather than adding up leave without pay time and making deductions as recommended by the Board, perhaps a better solution although he was not advocating it, would be to determine if an employee worked 173.3 or more hours for the month, the employee would be awarded seniority credit because Rule 12.1(3)(c) states that an employee would be awarded seniority credit for each full month of service, but it says nothing about seniority credits being deducted for instances where an employee has been on leave without pay. ACA Min reiterated that this was only a suggestion and not something that was being advocated by the City because the City's position at this point is that a full month of service equals a month without any instances of leave without pay. He stated that the Board chose to use 173.3 hours to define a month, but his only concern is whether this number would work for the month of February since it has fewer days than the other months.

Attorney Rind stated that the reason she disagreed with the suggested type of calculation as described by ACA Min was because she did not see how the City was going to calculate the number of hours for an employee of 25 years. She went on to say that soon the Board will hear a case regarding a Typist Clerk II that she is representing who was laid off. Attorney Rind further stated that some Typist Clerks can work overtime while others cannot so she wanted to know if the City was now saying that an employee who worked overtime would have more seniority than an employee of the same classification in a different unit that is not allowed to work overtime. Attorney Rind further stated that just saying an employee would receive seniority credit for every 173.3 hours of service is something that the Board has to really think about doing because it may not result in what she think the Rule is intended to reward. She stated that she did not think the Rule was complicated to interpret and if it is the City's position that a person failing to work a full month would not receive seniority credit, then why would the City be talking about pay. Attorney Rind went on to say that an employee on vacation is not at work the same as an employee who is on leave without pay so if it depends on actual work that is being performed, this would not work. She further stated that the interpretation of Rule 12 is for every month that an employee is at work, they would receive seniority credit, which is what seniority generally means in the industrial world.

ACA Min responded that he wanted to make a correction because earlier he did misspeak. He went on to say that it was not necessarily the number of hours an employee worked but the number of hours an employee received pay for work performance.

Member Silverman stated that it was his understanding that the City Manager overruled

*the Board's recommendation with regards to the calculating of seniority credit and if so, [he wants to know] did the City Manager issue a written opinion as to why he overruled the Board. ACA Min responded that the City Manager ruled that seniority credit should not be deducted but rewarded; however, he did not provide a solution as to how seniority credit should be awarded.*

*Member Silverman stated that with regards to the practical effect, if the Board grants seniority credit, how would it affect other employees because it appeared to him to be an issue of which employee was going to be laid off. Chairman Scarola responded that [whatever the Board's recommendation, if accepted by the City Manager] could alter the layoff list drastically if there are many employees who have been on leave without pay.*

*ACA Min stated that if the Board changes how seniority credit is to be calculated in Mr. Pierre's case, he would assume that his score would increase and someone else's score would decrease.*

*Charlie Cox, President, AFSCME Union-Local 1906, stated that anyone familiar with the City's pension system knows that if a person is without pay for a full day, the person is not given that day's credit, but given the month's credit minus the day. He went on to say that he would like to know how credit would be calculated if an employee went 1 hour without pay, but worked 10 hours of overtime in the same month because it would not make sense for the employee to put in more than a month's time but lose credit for that entire month because of the one hour the employee was without pay.*

*Member Silverman stated that it seemed to him that Mr. Cox was in a conflict situation and asked him if he would also go to bat for the employee that Mr. Pierre bumped should he receive a higher seniority score. Attorney Rind responded that there have been many employees who have been laid off. [Those who are believed to be] due to specific violations of the Civil Service Rules have come to the Board for a remedy, but in other cases [the laid off employees] are subject to an arbitration hearing that is currently pending between the AFSCME Union and the City.*

*Member Silverman asked Attorney Rind if she was saying that if the Board grants seniority credit for Mr. Pierre that she would go to arbitration for the employee that was bumped by Mr. Pierre. Attorney Rind responded in the affirmative. Member Silverman stated that it sounded disingenuous to him that the Union wants to save both employees when one has to be laid off. Attorney Rind stated that it was on a different issue which is whether there was a separate breach of separate provisions of the union contract. Member Silverman asked Attorney Rind if she was referring to all layoffs. Attorney Rind responded in the affirmative. Member Silverman stated that he understood since the issue would relate to all layoffs and not just one person.*

*Member Silverman asked if the union was saying that there should not be any layoffs. Mr. Cox responded in the negative.*

*Attorney Rind responded that their position in arbitration is there should not be any layoffs.*

*Following argument by respective counsel, Chairman Scarola stated that what has occurred is the City interpreted Rule 12.1(3)(c) one way and the employee another way. He went on to say that the City's position is that when calculating seniority, an employee that has been in a without pay status for any reason and any length of time, the employee would not receive credit for that month, but if the employee was in pay status for the entire month, credit would be granted. Chairman Scarola further stated that the employee has come to the Board to ask for another interpretation as to what is considered a full month of service and the Board offered one suggestion that was*



rejected by the City Manager so he wants a reevaluation of the Rule to be sent to the City Manager. Chairman Scarola asked if there were any recommendations concerning the interpretation of Rule 12.1(3)(c) as it relates to calculating seniority credit for the purpose of layoffs.

Member Kaplan read into the record a portion of Rule 12.1(3)(c) which states, "The order of permanent employees shall be determined by a layoff score computed in the following manner: A credit for seniority computed at the rate of one-tenth of one point (.1) shall be given to all employees in the particular classification for each full month service within his/her particular classification in which his/her efficiency rating has been reported as other than unsatisfactory . . ." He stated that in his opinion, this language relates mostly to satisfactory service within a month so he did not see how this language supports the department's view of how an employee can lose seniority credit. Member Kaplan went on to say that this language speaks about the quality of service in that month's time which would entitle the employee to credits, to mean that there is a mathematical calculation if an employee loses one hour that month [because he/she was without pay] that the employee would lose one month of service. He further stated that in his judgment, an employee is entitled to a full month of service based upon whether the employee worked that month despite the fact that the employee may have taken time off without pay. Member Kaplan stated that he thinks it is unfair for the interpretation of the rule to be so punitive in his judgment to lose an entire month of credit for one hour of leave without pay so his thought on this matter is what ACA Min has asked is what should the rule be for the accumulation of credits if all agree that it is unfair for an employee to lose an entire month of seniority for one-hour leave without pay for whatever reason.

Chairman Scarola reiterated that the Board needed to come up with another formula or recommendation to the City Manager as to how Rule 12.1(3)(c) is applied in the layoff category.

Member Kaplan stated that he thinks the Board should clearly say to deduct months where an employee was without pay for any length of time within a month is too punitive a rule for the Board to agree to and if the Board were to do that, it may or may not have to reach the next level of what then should be the rule if the punitive rule does not apply. He went on to say that he certainly would want the Board to consider whether the punitive rule is an operative rule. Member Kaplan further stated what should be the rule is what Attorney Rind suggested which is if the employee is in an employment status during any month, then the month is counted, which sounds reasonable to him, but he would rather the Board bifurcate the issue and first decide whether the punitive rule has any application.

Chairman Scarola stated that he thinks everyone agreed that the Rule was not appropriately interpreted and the City Manager is looking to the Board to come up with another recommendation.

Member Kaplan stated that it is an interesting question about how one makes motions. He went on to say that his motion is the rule that the City has presented was the applicable rule as represented by the application of that rule in the case of Mr. Pierre that it should not be the rule and he would like the Board to have an affirmative decision on it because the rule does not apply in this case. Member Kaplan further stated that the next motion that he or someone else might want to make is what then should be the rule.

Member Silverman stated that he thinks the Board should say to the City Manager that the City's interpretation of the rule as [it relates to] calculating [seniority credit] is incorrect and leave it at that.

*Member Scarola stated that he agreed with Member Silverman by saying to the City Manager that the Rule was interpreted incorrectly and then come up with a second recommendation as to how seniority credit should be calculated.*

*Following discussion, the Board entered a motion to find that the City's interpretation of Rule 12.1(3)(c) is incorrect which resulted as follows:*

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

**Aye:** Scarola, Dames, Silverman and Kaplan

**Absent:** Chairperson de la O

*Chairman Scarola stated that the Board now needs to make a recommendation on how to fix the problem.*

*Following argument by counsel and Board discussion, the Board entered a motion to recommend to the City Manager that Rule 12.1(3)(c) be interpreted as a full month of service for seniority credit shall be 150 paid hours which resulted as follows:*

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

**Aye:** Scarola, Dames and Silverman

**No:** Kaplan

**Absent:** Chairperson de la O

#### H.4

Hearing of appeal on behalf of Robert Byrd, Labor Crew Leader II, relative to his 3-day suspension, effective March 23, 2009.

*Chairman Scarola stated that the Board would not have sufficient time to hear the case of Robert Byrd and therefore called for a motion to CONTINUE the hearing and charge the continuance to the Board which resulted as follows:*

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

**Aye:** Scarola, Dames, Silverman and Kaplan

**Absent:** Chairperson de la O

#### H.5

Grievance Hearing on behalf of Lazaro Cabezas, Telecommunications Technician, regarding violation of Civil Service Rule 14.

*Chairman Scarola stated that the Board would not have sufficient time to hear the case of Lazaro Cabezas and therefore called for a motion to CONTINUE the hearing and charge the continuance to the Board which resulted as follows:*

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

**Aye:** Scarola, Dames, Silverman and Kaplan

**Absent:** Chairperson de la O

### ADJOURNMENT:

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

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

**Aye:** Scarola, Dames, Silverman and Kaplan

**Absent:** Chairperson de la O

**The meeting adjourned at 4:37 p.m. Breaks were taken at 11:28-11:44 a.m. and  
1:29-2:09 p.m. (Lunch).**

**SIGNATURE:**

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**Miguel M. de la O, Chairperson**

**ATTEST:**

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**Tishria L. Mindingall, Executive Secretary**