

City of Miami

*City Hall
3500 Pan American Drive
Miami, FL 33133
www.miamigov.com*



Meeting Minutes

Tuesday, August 24, 2010

10:00 AM

Commission Chambers

Civil Service Board

*Miguel M. de la O, Chairperson
Joseph Kaplan, Chief Examiner
Michael T. Dames, Board Member
Sean Moy, Board Member
Gerald Silverman, Board Member*

PLEDGE OF ALLEGIANCE

The meeting was called to order at 10:02 a.m. The roll call for the Board Members at the commencement of the meeting was as follows:

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

A. APPROVING THE MINUTES OF:

Regular Meeting of July 27, 2010.

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

Aye: Chief Examiner Kaplan, Member Silverman, Chairperson de la O,
Member Dames and Member Moy

B. PERSONNEL MATTERS

- B.1** Copy of a memorandum from Luis Cabrera, Deputy Chief, Department of Police, requesting an extension of probation of Michael Juchnowski, Police Officer, for four (4) additional months beyond November 26, 2010.
(DISCUSSION)

Chairman de la O asked if Officer Juchnowski or a representative from the Police Department was present to speak on this matter. The Acting Executive Secretary responded that neither were present; however, they did receive timely notice to be present at today's meeting. Without objection from other Board Members, Chairman de la O deferred this matter to the Board's next meeting.

DEFERRED

C. MILITARY LEAVES OF ABSENCE

- C.1** Elijah Taylor, Police Officer, requests Active Duty Military Leave, without pay, from July 1, 2010 through August 11, 2010. Copy of Orders submitted.
(DISCUSSION)

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

Aye: Chief Examiner Kaplan, Member Silverman, Chairperson de la O,
Member Dames and Member Moy

- C.2** Genesis Troutman, Park Ranger, requests Active Duty Military Leave without pay from August 29, 2010 through February 8, 2011. Copy of Orders submitted. (DISCUSSION)

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

Aye: Chief Examiner Kaplan, Member Silverman, Chairperson de la O,
Member Dames and Member Moy

D. DISCIPLINARY MATTERS

- D.1 Copy of a letter from Fredrick Hobson, Director, Department of Solid Waste, notifying Earl Johnson, Waste Collector, of a two (2) week suspension, effective July 26, 2010. (NOTIFICATION)

NOTIFIED

- D.2 Copy of a letter from Julie O. Bru, City Attorney, Office of the City Attorney, notifying Daylet Diaz, Litigation Assistant, of her termination, effective August 17, 2010. (NOTIFICATION)

NOTIFIED

- D.3 Copy of a letter from Chief Miguel Exposito, Director, Department of Police, notifying Aristides Paulino-Lajares, Police Officer, of his 40-hour forfeiture, effective August 6, 2010. (NOTIFICATION)

NOTIFIED

E. GENERAL ITEMS

- E.1 Notice of a Request for a continuance from Jean Marie Jean-Philippe, Police Officer, relative to his Appeal Hearing concerning his 80-hour suspension, effective March 29, 2010. (DISCUSSION)
- Chairman de la O stated that according to Officer Jean-Philippe's August 17, 2010 memo, he requested a continuance of his hearing to allow time for him to obtain legal representation. He asked the department's attorney if she had an objection to the continuance request. Iliana Forte, Assistant City Attorney, responded in the negative.*

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

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

Aye: Chief Examiner Kaplan, Member Silverman, Chairperson de la O, Member Dames and Member Moy

- E.2 Copy of Findings of Fact concerning the Appeal Hearing of Marcel Jackson, Police Officer, relative to his 40-hour suspension, effective May 16, 2009. (DISCUSSION)
- Deferred from the meeting of August 24, 2010.

The Acting Executive Secretary informed the Board that Attorney Rind is attending a union negotiations meeting; therefore, she would not be present at today's meeting.

Without objection from other Board Members, Chairman de la O deferred this item to the Board's next meeting.

DEFERRED

- E.3 Copy of Findings of Fact concerning the Appeal Hearing of Lazaro Cabezas, Telecommunications Technician, relative to his *de facto demotion and reduction in grade*. (DISCUSSION)

Deferred from the meeting of July 27, 2010.

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

Aye: Chief Examiner Kaplan, Member Silverman, Chairperson de la O, Member Dames and Member Moy

E.4

Copy of a memorandum from Barnaby Min, Assistant City Attorney, regarding the Whistleblower request from Michael Pizzi, Jr., Attorney, on behalf of his client Richard Brioso, former Assistant to the Director of GSA. (DISCUSSION)

Attorney Pizzi thanked the Board for its efficiency in getting so many things done in such a short period of time. He went on to say that notwithstanding anything that was said at the last meeting, his client, Mr. Brioso, submitted a letter dated August 4, 2010 advising of his withdrawal of his request for any type of whistle blower hearing before the Civil Service Board. Attorney Pizzi further stated that in their opinion, this would remove any jurisdiction from the Board to hold any proceedings and that they object to the Board holding a whistle blower hearing or entertaining any Motions today. He stated that it is also their opinion that the Civil Service Board is not an advisory or sounding Board for the City Attorney's Office. Attorney Pizzi went on to say that Mr. Brioso is an individual who is entitled to proceed in the manner he wants to with the individual case, but he does not want his case to be used as a sounding Board for the City Attorney's Office or anyone else to opine as to what their views are. He further stated that if the City Attorney's position is they disagree with the Board's action that was taken regarding his client's matter at the last meeting, he would say that they are entitled to their opinion and could state their opinion anywhere they felt it needed to be heard. Attorney Pizzi stated that in view of the fact that Mr. Brioso has withdrawn his request for a Whistle blower hearing before this body, there is no pending hearing, no legal jurisdiction to entertain opposing counsel's Motion for Reconsideration or for this Board to issue any further rulings on this matter because his client is not requesting a hearing. He went on to say that at this point, they would ask that the Board not allow the City to proceed with its Motion to Reconsider because there is nothing pending on this matter.

Barnaby Min, former Assistant City Attorney on this matter, stated that he agreed with Attorney Pizzi that Mr. Brioso has withdrawn his Whistle blower complaint. He went on to say that had Attorney Pizzi been on time when he announced to the Board that the purpose of this discussion was not to talk about Mr. Brioso's complaint or a Motion for Reconsideration, he would have known that he asked that this matter remain on the agenda as discussion item solely for the purpose that the Board understands what the issues are with regards to all Whistle blower complaints. Mr. Min further stated the issue he thinks the Board understood was based on comments made at the last meeting. He stated that it is imperative the Board understands that it does have jurisdiction to hear Whistle blower complaints and that it has been tasked with the responsibility of hearing Whistle blower complaints. Mr. Min went on to say that statements such as, "We are denying your request therefore, you have exhausted your administrative remedies. You can go straight to court." that were made at the last meeting are absolutely inappropriate and incorrect because what needs to happen is, before an employee can bring a Whistle blower complaint to court, according to State Statutes and the Third District Court of Appeals, they must exhaust their administrative remedies first by having a full-blown hearing by this administrative body. Mr. Min stated that this continues to be the department's position and this is the sole reason this matter is before the Board for discussion.

Chairman de la O asked if an employee exhausts his/her administrative remedies by requesting and having a hearing, or would requesting and having [the request] denied

be the same as having exhausted an employee's administrative remedies. Mr. Min responded in the negative. He went on to say it is his interpretation of the case law, which is included in the memo that was submitted to Board Members, that an employee would have to actually have a hearing. Mr. Min further stated that according to one of the cases, an employee went directly to court because apparently it was believed the employee had exhausted his/her administrative remedies, but that was incorrect because the courts ordered that the employee have a full-blown hearing prior to coming to court.

Chairman de la O responded that the case law presented by Mr. Min was a little different because the employee requested a hearing and regardless of whether it was granted or denied, they would go to court. He went on to say that his interpretation (regarding Whistle blower complaints) is if the employee asks for the remedy and it is denied, that employee has exhausted his/her administrative remedies because there is nothing more the employee can do simply because the employee asked and it was denied by the Board. Chairman de la O further stated that maybe he was wrong in his assumption, but the reason he asked the question is because what the Board does, has no preclusive or binding effect since the Board makes a recommendation to the City Manager and what the Manager does certainly can have an effect but more of an ameliorative effect, which means if the Manager undoes whatever the employee complained about, the court case is moot. He stated that if the Manager approves what happened to the employee, regardless of which way the Board voted, the employee may still proceed to court and nothing the Board has done binds either the City or the employee. Chairman de la O stated this is important because why have a hearing if the employee does not want it, which is what he wants to understand from the City. He went on to say that his vote was not that the Board did not have jurisdiction because he agreed with Mr. Min that the Board does have jurisdiction to hear Whistle blower complaints, but if the employee does not want a hearing and it is not going to help or hurt the City whether the hearing takes place, then he wonders why we'd waste everyone's time.

Mr. Min stated that under the Statute, it does not matter what the employee wants because the employee is required to exhaust his/her administrative remedies by going before an administrative body, which gives the City the opportunity to determine if it did anything wrong and if so, it would fix it. He went on to say that if the City is not given that opportunity and the employee goes directly to court, then it is a waste of the Board and the City's time as well as a waste of financial resources that have been lost because of a frivolous lawsuit that could have been handled in less time and with less money.

Chairman de la O asked Mr. Min if it is the City Attorney's position that a hearing should be granted for all Whistle blower claims. Mr. Min responded in the affirmative. He went on to say that to be clear, the only reason the department rejected the Whistle blower claim in the matter of Mr. Brioso was because what was submitted did not state a cause of action, so the proper remedy in such instances would not be to say that the person exhausted their administrative remedies, but to deny the request without prejudice so that the individual could refile their request to include details of whistle blower allegations. Mr. Min reiterated that this was a discussion geared towards how the Board should handle Whistle blower complaints and had nothing to do with Mr. Brioso.

Special Counsel Everett stated that she took issue with the statements made by former Assistant City Attorney Min because a memo was issued stating specifically that this discussion was about Mr. Brioso's matter. She went on to say that she is weighing in at this time because she thinks everyone wants the record to be clear about what happened at the last meeting. Special Counsel Everett further stated that this Board has a history of granting Whistle blower hearings; therefore, the issue was not that this Board did not have jurisdiction to hear Whistle blower complaints although it was indeed represented that she advised the Board that it did not have jurisdiction to hear such

complaints, which was not the case and needs to be cleared up. She stated that this matter concerning Mr. Brioso may be a bigger issue than just a Whistle blower complaint and she was sure that some on the dais were not sure as to what really is going on and she, herself, does not know why this has become a major issue, but in any event she would agree that there is no pending request for a Whistle blower hearing before the Board so that matter is moot. Special Counsel Everett went on to say that it should be quite clear, and she believes this Board agrees that on the matter of jurisdiction, the Board had discussion on the previous requests for Whistle blower hearings. She further stated that in this instance, the City took a very inconsistent position as to what she is hearing now because he made the complaint and there is an objection. Special Counsel Everett stated that she understands Mr. Min explaining what his objections were, but Mr. Min objected when the employee tried to come to the Board to exhaust his administrative remedies, Mr. Min raised an objection and then argue that this Board denied the request when he made what may well have been a legitimate objection for the Board to take into consideration before going forward.

Member Silverman stated that there was no purpose in this discussion because there is no hearing requested since the request was withdrawn, so he thinks that is as far as the Board should go on this matter. He went on to say that he does not think it is a good idea to give advisory opinions on what the Board thinks about a case that is not before the Board. Member Silverman further stated there is nothing pending (with regards to Mr. Brioso's whistle blower claim) and therefore the [discussion should be concluded].

Member Kaplan stated that he agreed with Member Silverman. He went on to say that it seemed to him that there is nothing before the Board at this time. Member Kaplan further stated that as to whether the request for the exhaustion of administrative remedy sought by the employee was defected or not and whether Mr. Brioso should be given another opportunity to amend the request are not for the Board to decide right now because they are not before the Board. He stated that these issues may very well come up in any potential lawsuit filed as to whether the administrative remedies were applied for and exhausted.

Mr. Min reiterated that he was not asking for a Motion for Reconsideration.

Attorney Pizzi thanked Members Silverman and Kaplan for their clarification that whatever comments that were made today were not advisory opinions, or binding because the Board has no jurisdiction and that this was just people opining on what they thought or did not think, which had no relevance so he and his client will stand on whatever the record was at the last meeting (when this matter was discussed). He went on to say that based upon language in the City Charter, City Code and Civil Service Rules, it is Mr. Brioso's opinion that this body absolutely has no jurisdiction to hold Whistle blower hearings for non-classified employees. He stated that since the matter was placed on the agenda as a "Brioso" matter, they object to any further proceedings because there is no matter pending before the Board.

Member Kaplan asked Attorney Pizzi if he reserved the right to raise the issue about the matters he just spoke about in a court proceeding later on. Attorney Pizzi responded that those are matters that can be raised by him or the City in court proceedings later on which is for another day before another body, but right now he felt it would be unfair to issue opinions and opine about matters that are not before the Board since this could be a dangerous thing to the City or anyone that comes before the Board.

Mr. Min reminded the Board that this is a discussion item and not a hearing, which has nothing to do with Mr. Brioso. He went on to say that he is not requesting an advisory opinion or a Motion for Reconsideration. Mr. Min further stated that this Board does have jurisdiction to have discussions which can be proven by the items on the Board's

agenda. He stated that this is simply a discussion of whether the Board has jurisdiction to hear Whistle blower complaints and irrespective of what Attorney Pizzi commented, the Board does understand that it has jurisdiction to hear Whistle blower complaints. Mr. Min went on to say that the other matter is whether employees have to exhaust their administrative remedies by having a full-blown hearing and it is the City's continuing position that a hearing is required to exhaust administrative remedies. He further stated that he was not asking for a ruling; however, if the Board wished to have discussion, he would gladly welcome any comments.

Chairman de la O asked if anyone wished to say anything further on this matter. The Acting Executive responded in the affirmative. For clarification purposes, the Acting Executive asked whether, regardless of an employee's classification -Executive, Unclassified, Classified, that such individuals must come before the Civil Service Board regarding Whistle blower complaints, and should the Board deny such a request that would mean the employee had exhausted his/her administrative remedies and may proceed to court. Member Silverman responded that this matter is not before the Board today and that the Board should not rule on a case which a person had not filed. He went on to say that Mr. Brioso's request was withdrawn; therefore, he did not see the need to take further action.

Chairman de la O stated the Board would consider this matter should it come up again.

Mr. Min stated that staff does need to understand how the Board would proceed on such matters since the staff works with the Board. Chairman de la O responded that staff will place such matters on the agenda, the Board would hear arguments, vote to grant or deny the hearing, and that matters will be handled on a case by case basis.

No other discussion took place on this matter.

DISCUSSED : Board's position is it stands by its original approved motion to deny Mr. Brioso's request for a Whistleblower hearing and that the Board does have jurisdiction to hear Whistleblower complaints; however, they would be considered on a case by case basis.

F. REPORTS

F.1 Pending Hearings as of August 24, 2010. (NOTIFICATION)

PRESENTED

G. REQUESTS FOR HEARINGS

H. TODAY'S HEARINGS

H.1 Hearing on behalf of Mauricio Garcia, Fire Fighter, relative to his Unsatisfactory Service Rating for the period ending June 2010.

Prior to entering into the hearing of Fire Fighter Mauricio Garcia, ACA Forte stated that both the department and the employee reached an agreement which is to take no further action on this matter.

Craig Dunn, Assistant Fire Chief, appeared before the Board and stated that Fire Fighter Garcia received a 240-hour suspension and according to the Fire Fighter contract, discipline of 120 hours or more triggers an automatic unsatisfactory service performance and has to be ratified by the Board. He went on to say that he has an agreement signed

by the union and Fire Fighter Garcia that his performance was unsatisfactory.

Chairman de la O stated that it would appear to him that the Board would not need to hold a hearing because the hearing would be to establish whether Fire Fighter Garcia's performance was unsatisfactory and whether he is to be terminated.

Cynthia A. Everett, Special Counsel to the Board stated that her understanding of Rule 13 (Service Ratings) is that if an employee receives an unsatisfactory rating that employee shall come before the Board in order for the Board to determine whether the employee should be retained.

Following discussion, the Board entered a motion to adopt the settlement and take no further action based upon the proffer from the department and agreement by the employee.

Under discussion, Special Counsel Everett stated that maybe she did not understand what the Board intended to accomplish (with regards unsatisfactory service rating hearings) however, the Rule indicates that once an employee receives an overall equivalency rating of unsatisfactory performance that employee is required to come before the Board for a hearing so she did not see how the agreement versus having a 240-hour suspension triggered the employee having to come before the Board.

Member Silverman stated that the employee is before the Board and he is in agreement with the department's settlement and the Board is only adopting what the parties agreed to. He went on to say that he would like to know where it is written that there has to be a trial when both sides agree to the ultimate decision.

Chairman de la O stated that (with regards to employees who receive an unsatisfactory service rating) Rule 13.2 states, ". . . the employee must appear before the Board to show cause why he should not be removed and if upon hearing, no reason is shown satisfactory to the Board, he shall be removed, suspended, or reduced in grade, as the Board shall determine."

Member Silverman stated that the parties reached an agreement so he thinks the Board could adopt the agreement.

Chairman de la O stated that he thinks the Board could determine that showing cause is that the Fire Department does not want to terminate the employee. He asked if it was the department's position not to terminate the employee. Assistant Fire Chief Dunn responded in the affirmative. Chairman de la O asked if it is the department's position that the employee is not reduced in grade or serve a suspension. Assistant Fire Chief Dunn responded that Fire Fighter Garcia did serve a 240-hour suspension and per the union contract any disciplinary action resulting in a penalty of 120 hours or more automatically triggers an unsatisfactory performance rating for the year. He went on to say that in the past when the Fire Department made this type of agreement, the matter had to come before the Board, but it was simply a ratification of the agreement that was already made with the union and the employee.

Chairman de la O asked whether the department takes the position that Fire Fighter Garcia needs a further suspension or reduction in grade. Assistant Fire Chief Dunn responded in the negative.

Chairman de la O stated that the department's position that it does not want to take further action on this matter should qualify as the show cause requirement under the Civil Service Rules.

Special Counsel Everett stated that it was not enunciated the first time around that the department was satisfied and wants to retain the employee, which is the reason she took the position earlier that the employee would have to come before the Board to show cause why he should not be removed.

Following discussion, the motion on the floor to find that no further penalty be taken in this matter, resulted as follows:

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

Aye: Chief Examiner Kaplan, Member Silverman, Chairperson de la O,
Member Dames and Member Moy

H.2

Hearing of appeal on behalf of Jeffrey Locke, Police Lieutenant, relative to his 20-hour suspension, effective February 25, 2009.

Teri Guttman-Valdes, Attorney at Law on behalf of Lt. Jeffrey Locke, stated that she asked for a continuance because she is in the process of obtaining documents for this extensive case.

Chairman de la O asked opposing counsel if she objected to the employee's request for a continuance. ACA Forte responded in the negative.

Member Dames asked for the number of times this case was continued. The Acting Executive Secretary responded that the Board approved one continuance on behalf of the department.

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: Chief Examiner Kaplan, Member Silverman, Member Dames and Member Moy

Abstain: Chairperson de la O

H.3

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

ACA Forte stated that she spoke with Attorney Rind yesterday, who advised that she would be asking for a continuance. She went on to say that she had no objection to the employee's request for a continuance.

Member Dames asked for the number of continuances granted in this case. The Acting Executive Secretary responded that the Board granted one continuance on behalf of the department.

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

H.4

Hearing of appeal on behalf of Eddy Rodriguez, Police Officer, relative to his 40-hour forfeiture, effective February 4, 2010.

ACA Forte stated that as a settlement of this case, Officer Rodriguez has agreed with the department's proposal to reduce the penalty (40-hour forfeiture of earned overtime) to a reprimand only, but they have to work out the settlement language.

Attorney Guttman-Valdes stated so that the record is clear, it is her understanding that the Police Department will unilaterally reduce her client's penalty to a reprimand only, which would take it out of the Board's jurisdiction. She went on to say that this provision is not a part of the settlement agreement but once that does happen, she and her client acknowledges that it removes jurisdiction from the Board. Attorney Guttman-Valdes further stated that they are having discussions with regards to the language to be used in the settlement agreement.

Chairman de la O stated that this item be removed from the Board's docket.

Cynthia A. Everett, Special Counsel to the Board, asked if the agreement is to remove the item from the Board's docket or to continue the matter with the hope that it would get resolved. ACA Forte responded that she thinks the matter should be continued since they are working on a settlement.

The Acting Executive Secretary stated that the Board's procedures is that whenever a continuance is requested and is granted due to a possible settlement, the parties shall submit, within 30 calendar days of the continuance, a joint stipulation of settlement to the Executive Secretary for submission to the Civil Service Board; however, should the parties fail to submit said notice within the required time period, the Executive Secretary would be obligated to reschedule the hearing.

Following discussion, the Board entered a motion to grant a JOINT CONTINUANCE which resulted as follows:

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

Aye: Chief Examiner Kaplan, Member Silverman, Chairperson de la O, Member Dames and Member Moy

H.5

Hearing of appeal on behalf of Jean Marie Jean-Philippe, Police Officer, relative to his 80-hour suspension, effective March 29, 2010.

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

CONTINUED

Non-Agenda Item Discussion: Assistant City Attorney Assigned to the Board

The following item did not appear on today's printed agenda:

Member Dames stated that Mr. Min received an appointment to a new position outside of the City Attorney's Office.

Mr. Min stated that he has been replaced by Iliana Forte who is a well accomplished attorney. He went on to say that he has been assigned to an administrative position under the City Manager.

On behalf of the Board, Chairman de la O commended Mr. Min on his new appointment.

ADJOURNMENT:

There being no further business to come before the Board, the Chairman called for a motion to ADJOURN which resulted as follows:

Motion by Member Silverman, seconded by Chairperson de la O, to APPROVE.

PASSED by the following vote.

Aye: Chief Examiner Kaplan, Member Silverman, Chairperson de la O,
Member Dames and Member Moy

The meeting adjourned at 10:44 a.m. A break was taken at 10:19 - 10:26 a.m.

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary