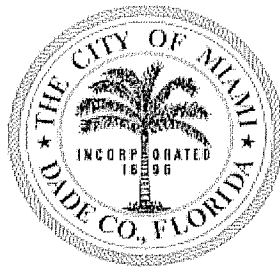


City of Miami

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Meeting Minutes

Tuesday, October 5, 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 10:10 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 September 21, 2010.

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

Aye: Kaplan, Silverman, de la O, Dames and Moy

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

- E.1** Copy of Findings of fact concerning the Appeal Hearing of Maurice Brighthaupt, Fire Fighter, relative to his 24-hour suspension, effective November 19, 2008. (DISCUSSION)

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

Aye: Kaplan, Silverman, de la O, Dames and Moy

- E.2** Notice of a Withdrawal of appeal from Osnat K. Rind, Attorney, on behalf of Marc Marcelin, Police Officer, concerning his 20-hour suspension, effective May 16, 2009. (NOTIFICATION)
Case will be closed and removed from the Board's docket.

NOTIFIED

- E.3** Notice of a Request for a continuance from Iliana Forte, Assistant City Attorney, relative to the Appeal hearing of Favian Rodriguez, Police Officer, concerning his 40-hour suspension, effective January 3, 2009. Osnat K. Rind, Attorney, expressed no objection to opposing Counsel's request. (DISCUSSION)
Hearing of appeal is scheduled for today.

Chairman de la O stated that opposing counsel expressed no objection to the department's request for a continuance and therefore asked for the scheduling history of Officer Rodriguez' case. The Executive Secretary responded that the Board granted one (1) continuance each to both sides.

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

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

Aye: Kaplan, Silverman, de la O, Dames and Moy

- E.4** Notice of a Request for a continuance from Iliana Forte, Assistant City Attorney, relative to the Whistleblower Hearing on behalf of Steven Wolf, *former C.I.P. Investigator*, Shawn Birken, Attorney, expressed no objection to opposing Counsel's request. (DISCUSSION)

Hearing of appeal is scheduled for today.

Chairman de la O stated that the employee expressed no objection to the department's request for a continuance and therefore asked if this was the first continuance requested in this case. The Executive Secretary responded that the Board granted one continuance on behalf of the employee and this was the first continuance requested by the department.

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

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

Aye: Kaplan, Silverman, de la O, Dames and Moy

F. REPORTS

- F.1** Pending Hearings as of October 5, 2010. (NOTIFICATION)

PRESENTED

G. REQUESTS FOR HEARINGS

- G.1** A copy of a Request for a Grievance hearing from Julianne Diaz, former Assistant to the Director of Public Works, pursuant to Civil Service Rule 2.7 Appearance Before the Board, concerning a request for 16.1 Abuse of Power or 16.2 Complaint by Employee. (DISCUSSION)
Deferred from the meeting of September 7, 2010.

Prior to consideration of this matter, the Executive Secretary informed the Board that the folder distributed to them contained additional information for review that was received from Julianne Diaz this morning. Chairman de la O responded that he would like to be briefed as to what the documents are about since the Board has not had an opportunity to review them.

Kyle Smith, Attorney at Law on behalf of Julianne Diaz, appeared before the Board and stated that they have been in contact with the City over the past couple of weeks trying to get a response regarding his client's claim as outlined in her demand letter so that they could prepare to file a Whistle-blower and EEOC complaint. He went on to say that it appeared from the review of the documents provided via their public records request that similarly situated employees of the City of Miami were provided severance pay upon their resignation despite the fact that severance is waived upon resignation. Attorney Smith further stated that the only difference between Ms. Diaz and those similarly situated employees (who did receive severance) is they were men and she is a woman.

He stated that Ms. Diaz was employed with the City for 7 years prior to her termination and that for 6 of those 7 years she served in the capacity of Assistant Director of the Public Works Department. Attorney Smith went on to say that despite her service to the City, she was not provided an explanation for her termination, she was not provided severance as is required, and she was terminated for reporting the creation of a dangerous work environment in violation of the City's Administrative Policy Manual (APM 1-99) that was allowed to persist even after several complaints from Ms. Diaz to the appropriate officials. He further stated that while these complaints were being made, the individual continued to show up at the work place with a threatening presence that caused emotional stress to Ms. Diaz and probably other City employees and nothing was done to rectify the situation despite Ms. Diaz' numerous complaints that are attached as exhibits to their demand letter.

Chairman de la O asked for the department's position on the employee's request for a hearing. Iliana Forte, Assistant City Attorney (ACA), responded that with regards to termination of employment, Ms. Diaz was an "at-will" employee and therefore she did not believe the City was required to give her reason for her termination although the City did give her a reason, which was essentially the elimination of her position. She went on to say that as to the argument on severance, the APM does not require that anyone receive severance so it is totally left at the discretion of the City Manager as to whether employees receive severance, so she did not see where the Board would have jurisdiction to hear the matters concerning termination and severance pay. ACA Forte further stated that in regards to the work environment, if Ms. Diaz is claiming that she was terminated as a result of a safety issue and that she was a whistle-blower, then she would agree that the Board would have to give her a hearing and that it would be her burden to prove; however, what she has heard thus far from Ms. Diaz' attorney today, none of his argument appeared to be in line with a whistle-blower claim. She stated that because Ms. Diaz needs to exhaust her administrative remedy before going to Circuit Court, this Board has jurisdiction to make that determination.

Chairman de la O stated that he understands the department's position that the City Manager had the discretion to terminate her employment and that severance pay was also discretionary because Ms. Diaz was an "at will" employee, but if the reasons why the discretionary act was taken are unlawful or discriminatory, then the City would not be allowed to exercise its discretion in that way. ACA Forte responded that she had not seen anywhere in Ms. Diaz' complaint that she was claiming discrimination because of her being a female and she does not think that is what the jurisdiction of this Board would be. She went on to say that she believed that in the matter of discrimination the Board did not have jurisdiction; however, if Ms. Diaz was complaining of being a whistle-blower because of her safety, that was another story; however, if she had cause for discrimination, she could file her complaint with the EEOC under Title 7, but not with the Civil Service Board.

Chairman de la O asked ACA Forte if she was saying that jurisdiction regarding discrimination would be exclusively handled by the Equal Employment Opportunity Commission (EEOC) and that the Board did not have jurisdiction over gender discrimination. ACA Forte responded in the affirmative. She went on to say that Ms. Diaz was an "at-will" employee and therefore does not follow the Civil Service Rules. She went on to say that this was not an abuse of power matter so she believed Ms. Diaz was entitled to a Whistle-blower hearing, but her other allegations were not within the jurisdiction of this Board.

Chairman de la O asked Attorney Smith for his response to ACA Forte's position. Attorney Smith responded that it was his understanding that Rule 14 does apply in his client's situation even though she was an "at-will" employee.

Member Silverman stated that he would like to know what authority the Board has to consider this matter since Ms. Diaz was the Assistant Director of a department and therefore would not be covered under the Civil Service Rules. Attorney Smith responded that he had no authority to point the Board to, but he could only tell the Board that it was his understanding that Rule 14 does apply in Ms. Diaz' situation.

Chairman de la O asked Special Counsel Everett to shed some light on this matter. Cynthia A. Everett, Special Counsel to the Board, stated that part of the problem she was having is the difference between Ms. Diaz' initial request and what the Board is hearing today. She went on to say that it would be helpful if all persons appearing before the Board would point the Board to a specific rule(s) that they are claiming to have been violated. Special Counsel Everett further stated that Rule 14 has a lot of different provisions so it is hard to make that determination. She stated that she believed that Ms. Diaz' original request was for a hearing pursuant to Rules 16.1 and 16.2 and the way the rules read, these rules could apply to anyone. Special Counsel Everett went on to say that Rule 17 does speak to particular characteristics such as race and gender, which the Board could consider, but as opposed to the Board trying to find the right rule, the employee or his/her counsel need to take out the time and identify for the Board which rules were violated.

Chairman de la O stated that he believes that Ms. Diaz prepared and filed her original request with the Executive Secretary, which was relatively vague. He went on to say that since Ms. Diaz indicated that her attorney (Smith) would supplement her request, he would suggest that Attorney Smith prepare a detailed request that would also specify which rules were violated and pursuant to which rule he is making the request (i.e. Rule 16.1, 16.2, etc.). Attorney Smith responded that he could point the Board to the demand letter he submitted because it explains in detail the different provisions they believe were violated. He went on to say that he thinks the Civil Service Rules call for an explanation of termination and while they have been told that an explanation was given, there have been different explanations given by the same employee of the City neither of which seemed to be valid explanations which was also explained in the demand letter. Chairman de la O responded that he believed a part of the problem is the Board usually receives documents ahead of time to read but in this instance the documents were received at today's meeting. He went on to say that he did not know what was the Board's pleasure and suggested that the Board could table the matter, take a recess to read the documents after considering all other matters on the agenda, or ask for a more detailed request for a hearing. He stated that although he provided several suggestions, there might be other options that had not come to his mind.

Member Kaplan stated it was clear that Attorney Smith's client is entitled to a whistle-blower hearing and according to the demand letter; it indicated that Ms. Diaz did not receive severance pay because she is a woman. He asked Attorney Smith was there anything else he was claiming to be a violation of the Civil Service Rules. Attorney Smith responded that he thinks those mentioned by Member Kaplan are the two main claims they have. He went on to say that their claim is that Ms. Diaz' termination was as a result of her complaining of a dangerous situation that was created in violation of APM 1-99 and that her persistent complaints regarding that dangerous situation led to her termination, which is their whistle-blower complaint. Attorney Smith further stated that Ms. Diaz was discriminated against upon her termination and they find the City in violation by not providing her with a valid reason for the termination and for providing a different reason that came from the same employee; therefore she was not provided any sort of explanation that she could respond to or to determine the reason she was terminated. He reiterated that Ms. Diaz was not provided severance pay while similarly situated employees were and the only difference between those similarly situated employees and Ms. Diaz is her gender.

Member Silverman reiterated that Ms. Diaz was in a management position and was therefore not covered under the Civil Service Rules so in his opinion, it would not matter whether she filed under Civil Service Rules 16, 17, etc., because she is not covered under the rules. Special Counsel Everett responded that as she listened to Attorney Smith's position, she heard the mention of a whistle-blower claim which would be considered by this Board. She went on to say that her question went to whether there were any other requests that were being made under a particular rule. Special Counsel Everett further stated that she understood what Member Silverman said and she agreed with him, but the way the rules (16.1 and 16.2) are worded it is difficult to reach the conclusion that it does not apply to any employee of the City. She stated that it only applies to a couple of rules, but the majority of the rules clearly cover the classified service. Member Silverman responded that (according to Special Counsel's explanation) this would be likened to the City Commission firing the City Manager and City Manager saying that he has rights under the Civil Service Rules, so he did not see the difference because Ms. Diaz was part of management. He reiterated that he did not have a problem with Ms. Diaz having a whistle-blower hearing, but any other claim before the Board would be a different story. Special Counsel Everett responded that Attorney Smith stated that there is a rule that applies that would entitle his client to a hearing pursuant to Rule 14 and when she inquired about the rule, she was referred to Ms. Diaz' demand letter of which she has not had an opportunity to read.

Chairman de la O stated that Rule 16.1 is directed to Board investigations of any violation of the rules so it does not limit who can make a complaint to the Board and elsewhere in the rules it specifies classified employees. He went on to say that Rule 16.2 does not apply only to a classified employee because it states that any employee who is aggrieved by reason of what he/she considers a violation of the Civil Service Rules can bring their complaint to the Board. Chairman de la O asked Special Counsel Everett if she had a position on whether the Board has jurisdiction over gender discrimination. Special Counsel Everett responded if Ms. Diaz was making a discrimination claim pursuant to Rule 16.1 there might be something that the Board could consider; however, as it stands now, Attorney Smith was guessing as to which rules would apply which is why she asked earlier that they provide a specific rule that they believed would cover their claims. Special Counsel Everett went on to say that everyone is in agreement that Ms. Diaz is entitled to a whistle-blower hearing if that is what she wants.

Following discussion, the Board entered a motion to DEFER this matter to the Board's next meeting in order to give the employee an opportunity to restate her claim.

Under discussion, Member Silverman stated that he does not believe Ms. Diaz is covered under the Civil Service Rules, but perhaps someone could change his mind.

For clarification purposes, Attorney Smith asked Member Silverman if he was only speaking to the gender discrimination issue. Member Silverman responded that he was referring to all claims with the exception of the whistle-blower claim.

Member Kaplan asked Attorney Smith if he was willing to have the claims bifurcated since everyone was in agreement that his client is entitled to a whistle-blower hearing and if so, was he prepared to go forward with the whistle-blower claim today. Attorney Smith responded that he would have to discuss this matter with his client and if she was willing, that would be something they could explore, but he did not want to waste the City's time by doing multiple hearings if everything could be done all at once.

Member Kaplan stated that the relief the Board could grant to the employee is reinstatement and back pay. Chairman de la O clarified that the Board has recommended other reliefs such as attorney fees, etc., but in the end, they are all

recommendations to the City Manager.

Attorney Smith asked if they would be able to reserve the right to amend their claim at any point in time to bring additional issues if they were to come up since they have made several public records requests and are still in the process of getting whatever information they can to determine exactly what happened so that they can present their best case to the Board.

Chairman de la O asked Attorney Smith if the Board were to defer his request, if he wanted it deferred for two or four weeks since he was still trying to obtain documents from the City. Attorney Smith responded that two weeks would be sufficient.

Member Moy stated that he did not think Ms. Diaz was a Civil Service covered employee, but management so he did not see where the Board was going with this matter. He went on to say that Ms. Diaz is entitled to a whistle-blower case and that the Board should be going in that direction.

Chairman de la O asked Member Moy if his view was to deny the deferment so that the Board could grant the whistle-blower hearing and deny a hearing on everything else. Member Moy responded in the affirmative. Chairman de la O responded that in the end he may agree with Member Moy's position, but he would rather give Attorney Smith and his client the opportunity to convince the Board otherwise.

Following discussion, the motion on the floor to defer this matter to the Board next's meeting to allow the employee an opportunity to restate her claim by providing the Board with a detailed request that would specify which rules were violated and pursuant to which rule he was making the request (i.e. Rule 16.1, 16.2, etc.) resulted as follows:

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

Aye: Kaplan, Silverman and de la O

No: Dames and Moy

G.2

Copy of a Request for a Grievance hearing from Mark J. Berkowitz, Attorney, on behalf of Glenn Marcos, former Director of Purchasing, pursuant to Civil Service Rule 2.7 Appearance Before the Board, concerning a request under 16.2. Complaint by Employee. (DISCUSSION)
Deferred from the meeting of September 7, 2010.

Attorney Berkowitz appeared before the Board and stated that his client, Glenn Marcos, was the Chief Procurement Officer for 7 1/2 years with the City of Miami before his termination of employment. He went on to say that in addition to their request under Rule 16.2, they were also making a demand for a whistle-blower hearing. Attorney Berkowitz further that the primary factual basis for the whistle-blower hearing was that less than 30 days prior to Mr. Marcos' termination of employment, he was asked to testify before the Security and Exchange Commission (SEC) by the City's outside counsel, Ivan Harris, who was with the Law Firm of Morgan, Lewis and Bockius. He stated at that juncture, Mr. Marcos indicated that he was going to be truthful with the SEC in its investigation and that he was going to testify regarding various financial practices which he felt were a violation of the law, which presented the City's financial situation in a more positive light that it actually deserved. Attorney Berkowitz went on to say at that juncture the City's outside counsel would not represent Mr. Marcos and in less than 30 days, Mr. Marcos' employment was terminated without giving him any reasons or allegations of why he was terminated. He further stated that they viewed this as a whistle-blower case and that he was informed by his client that there were

additional whistle-blower allegations that he would like to make. Attorney Berkowitz stated that if his client's request is approved for a hearing, they would like to have additional time to amend their complaint, which would all be under the heading of a whistle-blower complaint.

Chairman de la O asked for the department's position on Mr. Marcos' request for a hearing. ACA Forte responded that she had no objection to the hearing request, but would like to have something more specific so that she is able to defend the allegations with sufficient notice because all she had was a letter dated September 1, 2010 dealing with unlawful financial practices but no details regarding same. Attorney Berkowitz responded that they would be more than happy to provide a detailed written statement; however, he would only ask that they be given reasonable time to prepare the document.

Chairman de la O stated that he also thought Attorney Berkowitz' letter contained general categories and that was not to say it did not state a claim, but it was general. He went on to say that he was in agreement with ACA Forte that the department would need detailed information in order to defend the allegations.

The Executive Secretary stated that Attorney Berkowitz' letter indicated a request for hearing pursuant to Rule 16.2; therefore, she wanted to know if the motion would be for a whistle-blower hearing as was amended on the floor. Attorney Berkowitz responded in the affirmative.

Member Silverman stated for clarification purposes, he wanted to make sure that the employee's request was for a whistle-blower hearing and that they were not making any claims under the Civil Service Rules. Attorney Berkowitz responded in the affirmative.

Following discussion, the Board entered a motion to GRANT the employee's request for a whistle-blower hearing and also for Attorney Berkowitz to provide the Board with a detailed, written document of Mr. Marcos' claims prior to the hearing which resulted as follows:

Motion by Member Silverman, seconded by Chairperson de la O, that this matter be APPROVED. PASSED by the following vote.

Aye: Kaplan, Silverman, de la O, Dames and Moy

H. TODAY'S HEARINGS

H.1 Hearing on behalf of Steven Wolf, former C.I.P. Investigator, relative to his Whistleblower Hearing, pursuant to Florida Statute 112.3187.

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

CONTINUED

H.2 Hearing of appeal on behalf of Favian Rodriguez, Police Officer, relative to his 40-hour suspension, effective January 3, 2009.

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

CONTINUED

ADJOURNMENT:

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

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

Aye: Kaplan, Silverman, de la O and Moy

No: Dames

The meeting adjourned at 10:35 a.m.

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary