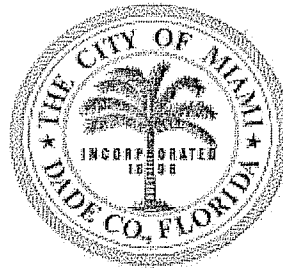


City of Miami

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Meeting Minutes

Tuesday, March 8, 2011

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 10:07 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 February 22, 2011.

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

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

B. PERSONNEL MATTERS

- B.1** Copy of a memorandum from Roy Brown, Assistant Chief, Department of Police, requesting a 2nd extension of probation of Michael Juchnowski, Police Officer, for 12 additional months beyond March 26, 2011. (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

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

- E.1** Copy of a Memorandum from Tony E. Crapp, City Manager, concerning the Grievance hearing of Miguel Hervis, Police Lieutenant, pursuant to Civil Service Rule 16.2, Complaint by Employee, a response will be forthcoming after the pending litigation matter is resolved. (NOTIFICATION)

NOTIFIED

- E.2** Notice of a Request for a continuance from Osnat K. Rind, Attorney, on behalf of Shekita Johnson, Communications Operator, relative to her 8-hour suspension, effective February 8, 2009. Janeen Richard, Assistant City Attorney, expressed no objection to opposing Counsel's request. (DISCUSSION)

Hearing of appeal is scheduled for March 22, 2011.

Stella Chu, Attorney, Law Firm of Phillips, Richard and Rind, appeared before the Board and stated that there was continuance requested of Shekita Johnson's hearing and she believed there was no objection from opposing counsel.

Chairman de la O asked opposing counsel for her position on the continuance request. Janeen Richard, Assistant City Attorney (ACA), responded that she had no objection to the continuance since it was explained to her that the employee had an injury which prevented her from appearing today.

Following discussion, the Board entered a motion to APPROVE the employee's request for a continuance. Under discussion, Member Moy stated that he was opposed to the continuance request because according to the Pending Hearings List, the Board granted four continuances on behalf the employee.

Attorney Chu stated that the hearing was rescheduled to March 22, 2011. Chairman de la O asked Attorney Chu if her client would be available to attend on the 22nd. Attorney Chu responded that she believed so.

For clarification purposes, the Executive Secretary stated that Ms. Johnson's hearing was scheduled for March 22, 2011; which is the date that Ms. Johnson is not available; therefore, her hearing has to be rescheduled to a date beyond March 22, 2011.

Member Dames asked ACA Richard if she was aware of the facts of this case and if she tried settling this matter. ACA Richard responded that she was not aware of all of the facts, but she would say that Attorney Rind contacted her to let her know that she could not go forward on March 22 because her client suffered an injury. She went on to say that with regards to settling the case, they tried to do so in the past and that she spoke to Attorney Rind recently and they agreed to reopen talk about settling the case. Member Dames asked ACA Richard to try to settle the matter since the Board had already heard the case involving the employee with whom Ms. Johnson had the verbal altercation and also to review the DVD of that hearing for purposes of helping them reach a settlement since it had been a while since the incident took place.

Following discussion, the motion on the floor to grant the employee's request for a CONTINUANCE 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

F. REPORTS

- F.1 Pending Hearings as of March 8, 2011. (NOTIFICATION)
PRESENTED

G. REQUESTS FOR HEARINGS

- G.1 Copy of a request from Wilfredo Cruz, Police Officer, for an Investigation hearing pursuant to Civil Service Rule 16.1, concerning an Abuse of Power complaint against Major Louis Melancon, Commander of Specialized Operations Section, Department of Police. (DISCUSSION)
Ronald J. Cohen, Attorney at Law on behalf of Officer Cruz, stated that he was recently retained as counsel and after meeting at length with his client and obtaining a lot of information during the interview, he felt the need to amend the letter submitted by his client and therefore is asking that this item be deferred. He went on to say that the last request he would make was for the Executive Secretary not to schedule the matter for discussion until she received the letter from him since he needed to check his calendar

for availability.

Following discussion, the Board entered a motion to DEFER this item until a time the Executive Secretary received Attorney Cohen's amended letter on behalf of his client for a hearing pursuant to Rule 16.1, which resulted as follows:

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

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

H. TODAY'S HEARINGS

- H.1 Grievance hearing on behalf of Olatunbosun "Ola" Aluko, former Director of Capital Improvement Programs, relative to his Whistleblower Complaint, pursuant to Florida Statute 112.3187.

Catherine Grieve, Attorney, Law Offices of Rivero Mestre & Castro, stated that she had been speaking with ACA Richard concerning Ola Aluko's hearing and (ACA Richard) advised that she would be requesting a continuance due to the unavailability of a witness. She went on to say that she had no objection to the continuance request but she would ask that the case be rescheduled as soon as possible.

ACA Richard stated that it was correct that due to the unavailability of her primary witness she asked for a continuance and that she would also ask that this case be set for a special meeting since it is a whistle blower case which can drag on for days.

Chairman de la O asked both attorneys how many witnesses did they have for Mr. Aluko's case. Attorney Grieve responded that she had approximately eight (8) witnesses and ACA Richard responded that she had approximately three (3) witnesses. Chairman de la O stated that this case might take two days to finish based upon the number of witnesses.

Following discussion, the Board entered a motion to APPROVE the department's request for a continuance and set the hearing for a special meeting date to convene at 9:00 a.m., which resulted as follows:

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

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

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

ACA Richard stated that she had a Motion for Protective Order that she wanted to be heard on prior to the start of Officer Rodriguez' hearing. She went on to say that the purpose of the Order was to exclude the testimony of Barnaby Min, former Assistant City Attorney, who represented the Police Department in this matter. ACA Richard further stated that opposing counsel subpoenaed Mr. Min, but she did not know why, but she thought anything Mr. Min would be asked at this hearing would be attorney/client privilege and would not be relevant to the issue at hand.

Chairman de la O asked Attorney Cohen if he had a copy of ACA Richard's motion. Attorney Cohen responded in the affirmative. He went on to say that he did not need Mr. Min to testify, but he thought the department would want to put on testimony as to

why Officer Rodriguez' case was originally withdrawn. Attorney Cohen further stated that he had a document asking that his client's case be withdrawn based upon a May 2010 memo from Barnaby Min to the Executive Secretary advising that reprimand #08-078 issued to Officer Rodriguez relative to his 40-hour suspension, effective January 3, 2009 was withdrawn.

Chairman de la O stated that in terms of the Motion for Protective Order, there was no opposition because Attorney Cohen advised that he would not call Mr. Min. He asked for the department's position on the withdrawal of the case. ACA Richard responded that the case was never withdrawn or settled and that she had minutes from the May 11, 2010 Civil Service Board meeting for which Mr. Min advised the Board that there was no settlement of Officer Rodriguez' disciplinary action and the Board moved to continue the hearing, which was reset for October 5, 2010, which was then also continued. She went on to say that for the employee now to say that the case was settled when it was continued twice (since the memo from Mr. Min was sent), it was obvious that the case was properly before the Board today.

Chairman de la O asked Attorney Cohen for his position. Attorney Cohen responded that he never claimed a settlement of this case, but a withdrawal of the charges. Chairman de la O asked ACA Richard if she was saying that at the time Mr. Min handled this case, it appeared there was a settlement, but it was not. ACA Richard responded in the affirmative. She went on to say that Mr. Min advised the Board that the reprimand was withdrawn in error and proceeded to read Mr. Min's statement from the May 11, 2010 meeting as follows, "ACA Min stated that he was under the impression that the case was resolved, but it was not. He went on to say that he apologizes for the mistake. He informed Attorney Rind of the mistake and therefore asked that the hearing be continued since Attorney Rind had already asked her witnesses not to attend the meeting."

Attorney Cohen stated that these charges were withdrawn and whether the department could reinstate the charges would seem to be double-jeopardy and cited the case law of United States of America versus State of New Jersey Civil Service Commission, 366 So.2nd 473 in support of his argument. He reiterated that this was not a settlement because the charges were withdrawn and furthermore, there would not have been any reason (for Mr. Min) to write to the Executive Secretary asking her to cancel the hearing if the charges were not withdrawn.

Chairman de la O asked the Board's Special Counsel for her position on this matter. Cynthia Everett, Special Counsel, responded that she was not provided with any of the documents or the case law that were distributed to Board Members so she could only go by what she heard and at the same time she did not want the Board to overstep its bounds. She went on to say that the Board does not institute charges under Civil Service Rule 14, except under certain circumstances, nor does it withdraw or dismiss charges. Special Counsel Everett further stated that she had not seen any authority or heard who had the authority until after hearing argument from ACA Richard that it was the Police Chief who imposed and withdrew charges (for the Police Department). She stated that she did not know if the Board saw anything, but she did not see anything to show that the Police Chief withdrew the charges. She stated that based upon the charges, the employee filed an appeal, which had not been withdrawn and therefore, there was a case to be heard or not. Special Counsel Everett reiterated that she did not want the Board to overstep its bounds based upon arguments rather than presented facts as to whether there was a matter to be heard.

Member Silverman asked Special Counsel Everett if he understood her to say that the City Attorney's Office did not have the authority to withdraw charges and that the charges must be withdrawn by someone in the Administration. Special Counsel Everett

responded in the negative. She went on to say that she did not hear anything presented to suggest who did or did not have the authority to withdraw or dismiss charges and that she was not shown any of the documents presented to the Board; therefore, she did not know if what the Board reviewed represented who had such authority. Member Silverman responded that based upon Special Counsel Everett's opinion, he understood her to say that the Board could not rely on the City Attorney's Office to dismiss or withdraw charges unless they showed proof that they had authority (from the department). Special Counsel Everett stated the argument she heard from the department was that the Police Chief was the person authorized to withdraw or dismiss charges and that former ACA Min did not withdraw the charges. She went on to say that she also heard representation about a settlement and that it did not happen. Member Silverman stated there were two issues: (1) Did the former Assistant City Attorney make a mistake? and (2) Did the Assistant City Attorney have authority to dismiss the case? He went on to say that if Special Counsel Everett was saying that the City Attorney did not have authority to dismiss the case, then the Board could not rely on anything the City Attorney said. Special Counsel Everett responded that she disagreed with Member Silverman's rationale because that was not what she meant. She went on to say that what she meant was she did not hear one way or the other from either side.

Chairman de la O stated he felt (Member Silverman's rationale) was overstated since the City Attorney represents the departments. He went on to say that since the department issued the discipline, his thought was that only the department would have the power to dismiss or withdraw charges, but they act through their lawyers.

Member Kaplan asked if it was the Board's duty to accept what (Min) said and believe that he was acting on the authority that he understood he had and that the Board should rely upon it. Chairman de la O responded that Member Kaplan was correct; except when there is a divergence between the client and the lawyer especially when plenty of settlements have been overturned because the client said that he did not give his attorney the authority to accept the settlement. He went on to say that he did not know if that is what happened in this case because it was unclear whether the Police Chief had a change of heart, whether there was a settlement that fell apart or whether Mr. Min acted precipitously because lawyers sometimes act and do not have the permission of their client.

Member Kaplan stated that the department filed a motion objecting to any testimony from Mr. Min because of privileged information. Chairman de la O responded that he disagreed with the department because he believed that Mr. Min could testify to anything that was not privileged information. Chairman de la O asked Member Kaplan if he wished to hear from Mr. Min. Member Kaplan responded in the affirmative. Chairman de la O advised Mr. Min that he did not know what was privileged and what was not so it was up to Mr. Min to invoke the privilege on behalf of his client. He explained to Mr. Min that the issue had come up as to the withdrawal of the charges in the matter of Favian Rodriguez' case and that the Board was interested in knowing why the charges were not withdrawn when the memo stated otherwise. Barnaby Min, Zoning Administrator, City of Miami, Office of Zoning, responded that it was more appropriate for the Police Chief to answer the question being asked by the Board.

Member Silverman asked Mr. Min if he made a mistake or did he have authority to do so when he withdrew the charges? Mr. Min responded that there were communications with the client to proceed in the manner he did. Member Silverman stated what he understood from Mr. Min's statement was that the client changed his mind. He went on to say that if this was not what happened, then Mr. Min could advise the Board. Mr. Min responded that he felt Member Silverman's thought on the matter was a fair conclusion.

Member Kaplan stated that he was kind of picky with the verbiage, "is withdrawing" as

compared with "have withdrawn or it is withdrawn". He asked Mr. Min if it was his intent when he wrote the memo to mean that the process of withdrawal was underway. Mr. Min responded in the affirmative. He went on to say that (based upon Mr. Min's statement), it was his understanding that when Mr. Min notified the Executive Secretary that the department wished to withdraw the reprimand that was so she could proceed with the withdrawal (by removing Officer Rodriguez' hearing from the Board's docket.) Chairman de la O stated so that everyone was clear, this was not a situation where a settlement was reached, but something happened that impeded the settlement which made Mr. Min's memo non-operative. Mr. Min responded that he did not think any new facts arose at that time.

Following discussion, the Board entered a motion to withdraw the charges and dismiss the case.

Under discussion, Member Kaplan stated that based upon Mr. Min's testimony, the distinction (Kaplan) made in the grammatical distinction did not exist. He went on to say that he thought what Mr. Min said was he in fact was withdrawing the charges. Member Kaplan further stated that he believed that the charges were withdrawn and that he agreed with Member Silverman.

Member Dames stated that he recalled a case before the Civil Service Board that involved a police officer who resigned on a Friday morning and later that afternoon he changed his mind. He went on to say that he (Member Dames) recalled diligently fighting for the matter to be rescinded so that the officer's employment could be reinstated. Member Dames further stated that he was not going to say today that something was withdrawn and now the Board was rescinding the charges; therefore, he would vote against the motion because he wanted to be consistent.

Chairman de la O stated that personally he did not see the fundamental unfairness of withdrawing the charges and later changing one's mind because he did not think the employee gave up anything and the department did not sign off on the withdrawal, although the department initially gave those instructions to Mr. Min, and he did not feel uncomfortable with the case going forward.

For clarification purposes, the Executive Secretary inquired whether she understood the motion to be based upon Mr. Min's representation that the charges were already withdrawn and not that the Board was dismissing the charges. Member Silverman responded that his motion was to dismiss the charges based upon what happened in this matter. Chairman de la O stated that in essence it was an involuntary dismissal of the charges by the Board although he was not certain the Board had the authority to do so. He went on to say that it was an involuntary dismissal because the Board was dismissing the charges and not the department.

Member Silverman stated that Mr. Min apparently had authority from the Police Department to withdraw the charges and after he withdrew the charges, the Police Chief changed his mind and Mr. Min withdrew his withdrawal.

Member Kaplan stated that if in fact the Board did agree that charges withdrawn by an attorney who had the power to do so would be ineffective because the Police Chief changed his mind, then a person would have to ask himself how long would that privilege take, because then that would raise the question of whether department directors could change their minds a year later because they made a mistake thereby causing the charges not to be withdrawn and the case heard. Chairman de la O responded that he believed the test would be whether there had been any detrimental reliance or change in position.

Following discussion, the motion on the floor that the Board withdraw the charges and dismiss the case resulted as follows:

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

Aye: Kaplan, Silverman and Moy

No: de la O and Dames

Following the Board's vote, Member Kaplan asked if the Board had authority to dismiss charges under these circumstances. Special Counsel Everett responded that the Board's duty is to hear charges. She went on to say that there was an appeal made by the employee concerning discipline he received and because the charges were not withdrawn, the matter of Officer Favian Rodriguez was properly before this Board. Special Counsel Everett further stated that the Board (under Rule 14) did have the authority to conduct hearings and make certain findings, but it did not have the authority to dismiss charges imposed by a department.

Member Silverman stated that the charges were withdrawn by the department and all this Board did was affirm the action of (former Assistant City Attorney Barnaby Min). He went on to say that he believed the hearing was over and that the Board needed to let the City Manager do whatever he needed to do concerning this case and he was sure that the employee would do whatever he needed to do.

H.3

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

Following the break, Chairman de la O asked if there was an announcement to be made with regards to Officer Rengifo's case. Attorney Cohen responded in the affirmative. He went on to say that the issue was resolved, there was no need for a hearing, and they would be preparing appropriate settlement documents.

Chairman de la O asked the department's attorney if she agreed to settling this case. ACA Richard responded in the affirmative.

NO ACTION TAKEN : Case will be closed and removed from the Board's Docket upon receipt of written settlement agreement or rescheduled in accordance with the Board's Continuance Policy.

H.4

Hearing of appeal on behalf of Jacqueline Mesidor, Police Sergeant, relative to her 10-hour suspension, effective December 7, 2008.

Attorney Cohen stated that he reached an agreement with the department; therefore this case was settled.

NO ACTION TAKEN : Case will be closed and removed from the Board's Docket upon receipt of written settlement agreement or rescheduled in accordance with the Board's Continuance Policy.

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, Dames and Moy

The meeting adjourned at 11:17 a.m. A break was taken at 10:53-11:14 a.m.

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary

