

City of Miami

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

Tuesday, August 9, 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 10:10 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 July 26, 2011

**Motion by Member Silverman, seconded by Chief Examiner Kaplan, 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**

- D.1 Copy of a letter from Mariano Fernandez, Director, Department of Building & Zoning, notifying Carlos Jimenez, Structural Engineer/Plans Examiner, of his 5-day suspension, effective July 26, 2011 and a copy of a request to appeal from Michael Braverman, Attorney, on behalf of Carlos Jimenez. A hearing of appeal will be scheduled in accordance with Civil Service Rules & Regulations. (NOTIFICATION)

RECEIVED AND FILED

- D.2 Copy of a letter from Chief Miguel Exposito, Director, Department of Police, notifying Vernell Reynolds, Police Officer, of her termination, effective July 29, 2011 and copy of a memorandum from Vernell Reynolds, requesting a hearing of appeal relative to her termination. A hearing of appeal will be scheduled in accordance with Civil Service Rules & Regulations. (NOTIFICATION)

RECEIVED AND FILED

E. GENERAL ITEMS

- E.1 Copy of Findings of Fact in the Appeal Hearing of Jorge E. Aguilar, Police Officer, relative to his 80-hour forfeiture, effective October 26, 2008. (DISCUSSION)
- The Executive Secretary informed the Board that she received a request from Attorney Ronald J. Cohen to carry this matter over to the Board's next meeting. Hearing no objections, the matter was deferred.*

DEFERRED TO THE AUGUST 23, 2011 MEETING FOR BOARD CONSIDERATION.

- E.2 Copy of Findings of Fact in the Grievance Hearing on behalf of Louis A. Brennan, Firefighter, pursuant to Civil Service Rule 16.2- Complaint by Employee, alleging a violation of Civil Service Rule 6.4. (DISCUSSION)
The Board entered a motion to APPROVE the Findings of Fact as amended, 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

F. REPORTS

- F.1 Pending Hearings as of August 9, 2011. (NOTIFICATION)
PRESENTED

G. REQUESTS FOR HEARINGS

H. TODAY'S HEARINGS

- H.1 Hearing on behalf of Dwayne Franck, Fire Fighter, relative to his Unsatisfactory Service Rating for the period ending June 2011.
Chairman de la O stated that the Board will consider Items H.1 through H.4 together; however, the Executive Secretary will record the votes separately.
- Tom Pupo, Executive Assistant to the Fire Chief, stated that he was present on behalf the four Fighters (Dwayne Franck - Item H.1, John Ballas - Item H.2, Patrick Murdock - Item H.3, Thomas Thelusma - Item H.4) who were rated Unsatisfactory for the indicated rating period.*
- Janeen Richard, Assistant City Attorney (ACA), stated that there is a Memorandum of Understanding between the Fire-Rescue Department and Fire Fighters Union Local 587 that states, whenever an employee receives a suspension of 96 hours or greater discipline during any one rating period, the employee automatically receives an overall unsatisfactory rating in the annual performance evaluation. She went on to say that pursuant to Civil Service Rule 13, the employee then has to come before the Board to show cause why he/she should not be removed. ACA Richard stated that in the past the Fire-Rescue Department and the affected Fire Fighter entered into an agreement where the Fire Fighter does not oppose the unsatisfactory rating, which has been sufficient for this Board to forgo a full hearing. She went on to say that Executive Assistant Pupo has signed agreements from all four Fire Fighters agreeing to the unsatisfactory rating and that he is available to answer any questions the Board may have on this matter.*
- Chairman de la O asked if there were any questions or comments from the Board. Member Silverman stated his recollection was that in the past, the Board would accept the unsatisfactory rating with no further penalty.*
- Following discussion, the Board entered a motion to adopt the unsatisfactory service rating for the period ending June 2011 without further penalty. Under discussion, Member Dames asked if the Fire-Rescue Department had the right to enter into an agreement with a Fire Fighter and include in the agreement that the employee would not*

have rights to go before the Civil Service Board if the employee breached the agreement? Chairman de la O responded the question is could an employee sign such an agreement and if it is valid. He went on to say that the four Fire Fighters could be before the Board fighting for their jobs if they wanted to (in accordance with Rule 13), but Management has agreed that it is not going to come before the Board and push for their termination. Chairman de la O further stated with that being said, it begs the question, is it valid for an employee to agree that should he/she commit another violation that he/she waives his right to come before the Board to fight for his/her job? He went on to say that he did not know the answer to that question and that he could defer the question to Special Counsel Everett, but she was not present. Chairman de la O further stated the Union seemed to have no problem with the settlement since they told the employees to sign it and that he can assure Member Dames that if the settlement is in fact invalid and one of the Fire Fighters breaks the agreement, there would be some litigation over it.

Member Dames stated that he had a problem with the language that stated the employee would have no rights to come before the Board if he broke the agreement. Chairman de la O responded that a person can sign a contract that waives their right to a jury trial so if this is valid, his thought is the department has the right to waive an employee's right to come before the Board.

Following discussion, the motion on the floor to adopt the unsatisfactory service rating without further penalty for the period ending June 2011 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.2

Hearing on behalf of John Ballas, Fire Fighter, relative to his Unsatisfactory Service Rating for the period ending June 2011.

The Board entered a motion to accept the unsatisfactory rating without further penalty for the period ending June 2011, 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.3

Hearing on behalf of Patrick Murdock, Fire Fighter, relative to his Unsatisfactory Service Rating for the period ending June 2011.

The Board entered a motion to accept the unsatisfactory rating without further penalty for the period ending June 2011, 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.4

Hearing on behalf of Thomas Thelusma, Fire Fighter, relative to his Unsatisfactory Service Rating for the period ending June 2011.

The Board entered a motion to accept the unsatisfactory rating without further penalty for the period ending June 2011, 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.5

Grievance hearing on behalf of Ariel Coll, Sanitation Inspector (former), pursuant to Civil Service Rule 16.1 and 16.2, concerning a violation of Rule 12.1 and Rule 12.2, Layoff, Resignation, and Reinstatement, regarding his layoff.

Attorney Guttman-Valdes stated that she needed to request a continuance.

Chairman de la O asked for the scheduling history of Ariel Coll's case. The Executive Secretary responded that Attorney Guttman-Valdes requested and the Board granted her client's request for hearing on April 5, 2011. She went on to say that this is the first time the hearing was scheduled and the first request for a continuance.

Member Silverman stated that he wished to hear the reason for the continuance. Attorney Guttman-Valdes responded that she made a public records request because she needed additional documents to show the violation in the layoff process regarding her client. She went on to say that the documents were ready in June 2011, which was the time she was experiencing personal difficulties so she was not able to review the documents with Terrella Johnson (of the Human Resources Department) until July 21, 2011. Attorney Guttman-Valdes further stated that although Ms. Johnson prepared the documents, some were missing. She stated after Ms. Johnson gathered the missing documents, she received the invoice the following week, she remitted payment, and she received the documents over the weekend. Attorney Guttman-Valdes went on to say she had not had an opportunity to review the information and she still has questions which is the reason she requested a continuance.

Chairman de la O asked for the department's position on the continuance request. ACA Richard responded that she opposes the continuance request because Attorney Guttman-Valdes requested the documents in December 2010 and they were made available to her. She went on to say that Ricardo Martinez (Supervisor, Classification & Pay) is present to testify that the same public records request was made by Attorney Guttman-Valdes in December regarding the Sanitation Inspector layoffs, that she was offered to come into the office to review the documents, and that the requested information was sent to her. ACA Richard further stated that opposing counsel stated that she did not receive the documents until June 2011, but she did not think that was necessarily true because she has an email showing that the information was turned over to Attorney Guttman-Valdes in December 2010.

Member Moy asked the Executive Secretary if she knew when this case would be rescheduled. The Executive Secretary responded that according to her schedule, cases are booked until next year.

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 Chief Examiner Kaplan, that this matter be CONTINUED. PASSED by the following vote.

Aye: Kaplan, Silverman, de la O and Moy

No: Dames

Following the Board's approved motion to continue Ariel Coll's appeal hearing, ACA Richard asked to be heard. She stated that if there is going to be a continuance request made, she would ask that it not be requested the day of the hearing. She went on to say that she had to meet and prepare with her witnesses and she stayed late last night

making dozens of copies in preparation for today's hearing. ACA Richard further stated that this case has been dragging on for a long time and as the Board may recall, Mr. Coll took a year after he was laid off to come before the Board to request a hearing. She stated that she would like for there to be some courtesy rather than have the continuance request thrown upon her the day of the hearing. Chairman de la O responded that he thought ACA Richard's request was fair and that he would ask Attorney Guttman-Valdes to give opposing counsel's request some consideration. No further action was taken by the Board.

H.6

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

The Board entered into the Whistleblower hearing on behalf of Steven Wolf, the Grievant. Chairman de la O recused himself and Member Kaplan presided over the hearing.

Shawn Birken, Attorney at Law, represented the Complainant.

Charles C. Mays, Independent Counsel and Janeen Richard, Assistant City Attorney, represented the Department.

Opening statements were presented by Attorneys Shawn Birken and Independent Counsel Charles Mays. The Rule of Witnesses was invoked and all witnesses were sworn in. Chairman Kaplan instructed those who would be testifying not to discuss the case among themselves. Witnesses for the Complainant appeared in the following order:

1. Steven Wolf, former Chief Investigator, City of Miami, Civilian Investigative Panel (CIP), testified on his own behalf. Questions were posed by Board Members Dames, Kaplan, and Moy during the testimony of Steven Wolf.

NOTE: At the outset of Attorney Birken's direct examination of Steven Wolf, Chairman Kaplan stated that he wished to make one observation and while he was not ruling on it, it was a matter for the Board and counsel to consider. He went on to say that it troubled him that a significant amount of testimony will deal with the Complainant's relationship with Independent Counsel Mays; therefore he had issue with Charles Mays participating as counsel; however, because Attorney Birken expressed no objection and no Board Member other than Member Dames raised the issue, he did not have a majority consensus from the Board; therefore, he would move on with the case.

Independent Counsel Mays cited the case of McCarthy vs Merrill Lynch Realty, 550, 516 So.2nd 23, Third District Court of Appeal, in support of his position to sit as counsel in these proceedings.

Attorney Birken continued with the calling of witnesses as follows:

2. Luis Cabanillas, former Investigator, City of Miami, Civilian Investigative Panel. Questions were posed by Member Dames during the testimony of witness Luis Cabanillas.

The Complainant rested his case.

ACA Richard made a motion for a Directed Verdict and provided argument in support of her position. She stated that the Directed Verdict is based upon a couple of reasons:

(1) The burden of proof is clearly that of Mr. Wolf to establish that he meets the

requirements set forth in Florida State Statute 112.1387 and it is their position that he has not. ACA Richard further stated that all can agree that Mr. Wolf is travelling under the prong that he must on his own initiative submit a written and signed complaint; however, many times Mr. Wolf testified that he was just responding to Panel Members (CIP) who reached out to him. She stated based upon his testimony, they make the argument that the information was not put forth on his own initiative but in response to questions, inquiries from Panel Members. (2) The Statute indicates that it is not just anything that a person complains about rather the complaint has to be about high-level gross mismanagement, malfeasance, misfeasance, etc. She directed the Board's attention to subsection (e) of the Statute which defines gross mismanagement as follows: "A continuous pattern of managerial abuses wrongfully or arbitrarily and capricious actions or fraudulent or criminal conduct which may have substantial adverse economic impact." ACA Richard stated there had been no testimony whatsoever presented by opposing counsel and his client as to any managerial abuses, anything that caused economic impact, or anything that would rise to the level of gross mismanagement. (3) Mr. Wolf testified that he had problems with the way former Director of CIP, Shirley Richardson, ran the office but she left CIP in January, 2009 and Mr. Wolf was not released from his job until October, 2009 so any complaints he had about Ms. Richardson clearly did not play any role in his termination. ACA Richard further stated that Mr. Wolf did send emails from his personal computer; however, under cross-examination he testified that he had no knowledge of whether the emails were disseminated to Shirley Richardson prior to her leaving CIP or to Carol Abia (Interim Director) who was the ultimate decision maker as to whether Mr. Wolf had to be laid off. She stated there must be causation between the events of the alleged protected disclosure and the timing of Mr. Wolf's termination; however, the emails submitted by Mr. Wolf are from early 2008 and he was not released until October 2009 so there is no way that he made any connection with the dates of the emails and the date of his termination. ACA Richard reiterated that Mr. Wolf did not establish causation, gross mismanagement, or any act of substantial adverse economic impact; therefore, he has not met his burden under the Statute to prove that he is a whistleblower; therefore, his whistleblower complaint be denied in its entirety.

Chairman Kaplan called for a motion on the department's Directed Verdict. Member Silverman stated that he preferred hearing from opposing counsel before making a motion. Chairman Kaplan asked opposing counsel for his position. Attorney Birken responded that he was willing to follow whatever rules the Board have in place and that he would be happy to respond if need be.

Following discussion, Member Silverman stated that Mr. Wolf has the burden of proving the allegations required under the Statute and that he failed to meet that burden. He moved that that a report be sent to the City Manager indicating that this Board denies Mr. Wolf's Whistleblower complaint. The motion died for lack of a second and ACA Richard proceeded with the calling of witnesses. Witnesses for the department appeared in the following order:

Carol Abia, Interim Director, City of Miami, Civilian Investigative Panel. Questions were posed by Board Members Kaplan, Moy, and Dames during the testimony of witness Carol Abia.

The Department rested its case and the Grievant waived rebuttal. The Board proceeded to closing arguments that were presented by Attorneys Shawn Birken and Janeen Richard. Following final argument, the Board entered a motion to report to the City Manager that the Grievant failed to prove his burden under the Whistleblower Statute and that the City has proven its affirmative defense that the employee's discharge from employment was due to the 50% budget reduction and was not therefore for retaliatory actions. The motion 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 Dames

No: Moy

Absent: de la O

ADJOURNMENT:

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

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

Aye: Kaplan, Silverman, Dames and Moy

Absent: de la O

Breaks were taken at 10:53-11:04 a.m., 11:49-12:04 p.m., 1:19-2:24 p.m. (LUNCH BREAK) and 3:50-3:58 p.m. The meeting adjourned at 5:01 p.m.

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary