

City of Miami

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

Monday, May 6, 2013

10:00 AM

Commission Chambers

Civil Service Board

*Gerald Silverman, Chairperson
Sean Moy, Chief Examiner
Lillie Harris, Board Member
Javier Baños, Board Member*

PLEDGE OF ALLEGIANCE

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

Present: Chairperson Silverman, Chief Examiner Moy, Member Harris and Member Baños

A. APPROVING THE MINUTES OF:

Regular Meeting of April 16, 2013.

The Board entered a motion to APPROVE the minutes of the April 16, 2013 meeting which resulted as follows:

Motion by Member Baños, seconded by Chief Examiner Moy, to APPROVE. PASSED by the following vote.

Aye: Silverman, Moy, Baños and Harris

B. PERSONNEL MATTERS**C. MILITARY LEAVES OF ABSENCE**

- C.1 Luis F. Pla, Police Officer, requests active duty military leave extension without pay from April 13, 2013 through August 31, 2013. Copy of amended orders submitted. (DISCUSSION)

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

Aye: Silverman, Moy, Baños and Harris

D. DISCIPLINARY MATTERS

- D.1 Copy of a letter from Chief Manuel Orosa, Director, Department of Police, notifying Constant Rosemond, Police Officer, of a 10-hour suspension, effective May 6, 2013. (NOTIFICATION)

NOTIFIED

- D.2 Copy of a letter from Chief Manuel Orosa, Director, Department of Police, notifying Melvin Calixto, Police Officer, of a 10-hour suspension, effective May 2, 2013. (NOTIFICATION)

NOTIFIED

- D.3 Copy of a letter from Chief Manuel Orosa, Director, Department of Police, notifying John Askew, Police Officer, of a 20-hour suspension, effective April 19, 2013. (NOTIFICATION)

NOTIFIED

E. GENERAL ITEMS

- E.1 Copy of Findings of Fact concerning the Appeal Hearing of Osmar Martinez, Police Officer, relative to his 10-hr suspension, effective September 30, 2012. (DISCUSSION)

Motion by Member Baños, seconded by Member Harris, that this matter be APPROVED. PASSED by the following vote.

Aye: Silverman, Moy, Baños and Harris

- E.2 Copy of Findings of Fact in the Appeal Hearing of Osmar Martinez, relative to his 40-hr suspension, effective October 25, 2012. (DISCUSSION)

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

Aye: Silverman, Moy, Baños and Harris

F. REPORTS

- F.1 Pending Hearings as of May 6, 2013. (NOTIFICATION)

PRESENTED

G. REQUESTS FOR HEARINGS

H. TODAY'S HEARINGS

- H.1 Grievance Hearing on behalf of Paul Hernandez, Chief Mechanical Inspector, pursuant to Civil Service Rule 16.1, violation of 14.10 Reduction in Pay.

The Board entered into the grievance hearing of Paul Hernandez.

Michael Braverman, Attorney at Law, represented the employee.

Casey P. Cohen, Assistant City Attorney (ACA), represented the department.

Prior to making opening statements, Attorney Braverman raised a procedural issue as to which side had the burden in this case. He went on to say he believed the department should have the burden of proof because in their opinion this was a constructive demotion and as such, they filed a claim pursuant to Rule 14 and a Rule 16 grievance hearing pursuant to a violation of Rule 14.

Chairman Silverman asked for the department's position on the burden of proof issue. Janeen Richard, Assistant City Attorney, responded she recalled the employee filed a grievance hearing pursuant to Rule 16, alleging a violation of Rule 14.10, Reduction in Pay or Position, and the Board approved it, so it was the employee's burden of proof to establish that he was reduced in pay and position.

Hearing from both sides on this issue, the Chairman advised Attorney Braverman to move forward with opening statements, which he did, and the department's attorney waived opening statements. All witnesses were sworn in individually. Witnesses for the employee appeared in the following order:

Paul Hernandez, Chief Mechanical Inspector, City of Miami, Department of Building, testified on his own behalf. Questions were posed by Board Members Moy and Harris during the testimony of Paul Hernandez. The employee rested his case.

ACA Cohen moved to dismiss the employee's case on the basis that the employee failed to meet his burden of proof. She went on to say that Mr. Hernandez filed a complaint under Rule 16, alleging a violation of Rule 14.10, Reduction in Pay or Position, but when asked under cross examination if he received a reduction in pay or position, he responded in the negative. The Chairman denied the motion and the department proceeded with the calling of witnesses. Witnesses for the department appeared in the following order:

1. Ricardo Martinez, Compensation Supervisor, City of Miami, Department of Human Resources. Questions were posed by Board Member Harris during the testimony of Ricardo Martinez.

The department rested its case and the employee waived rebuttal. The Board proceeded to closing arguments and both attorneys presented their positions on the case. Following final argument, the Chair opened the floor for Board discussion.

Member Harris stated she understood the employee had the burden of proof in this case; however, it bothered her that the department did not seem to have concern of whether the City was getting its return on investment. She went on to say that the department's witness was not prepared to answer questions she posed. Member Harris further stated she wished the department director was present to ask him if he felt okay with the way his department operated because as department director a few of his responsibilities are to ensure that his department is using public funds responsibly and that it was ran in an efficient and effective manner. She stated she felt not only was it public information, but with regards to this case, it was also important for her to know who Mr. Perez (person mentioned by the Grievant) was, and his pay rate, but the department could not answer these questions. Member Harris went on to say when considering Rule 14.10 that the employee alleged the department violated, this rule is not only about the employee but it also governs the City as to how it manages public funds. She further stated it was proven the employee did not experience a reduction in pay or job title, but rather a reduction in the work Mr. Hernandez performed. Member Harris stated this matter is about a return in investment and the City has a responsibility to ensure its human resources are being used appropriately.

Member Banos stated given the comments made by Member Harris, the way he sees it, his job as a Board Member is not to micro-manage what the City does but to determine whether or not the rules have been violated. He went on to say that if the Board found there was a violation, then its responsibility as a body would be to determine a proper remedy. Member Banos further stated according to Rule 1.14 it defines demotion as a reduction in classification and status and is used when an employee is found to be unsatisfactory in the employee's higher level or for disciplinary reasons. He stated it seemed to him that based on the strict reading of Rule 1.14, despite whatever mismanagement may have been done by the department, it still was consistent in following what the job description [for Chief Mechanical Inspector] prescribed so he did not see that the employee met his burden.

Member Moy stated it was clear to him that Mr. Hernandez' duties were reduced (and because of the reduction in duties performed), the City can always come back tomorrow and say it was reducing his pay to that of a Mechanical Inspector II, etc. He went on to say that this has happened in the past and in most cases it happened to civilian employees. Member Moy further stated that Mr. Hernandez is performing on a limited basis in comparison to other Chief Mechanical Inspectors in the Building Department so

he really believed Mr. Hernandez' concern was that the City can reduce his pay if he was not performing the duties of his job. He stated that Mr. Hernandez is a good employee with a clean [personnel] record and in listening to his testimony, he appeared to be truthful whereas others have come before the Board and were untruthful. Member Moy went on to say that [according to testimony], the department did not know who Mr. Perez was or how much money he was making and the only thing Mr. Hernandez was asking was to have his job back [by performing the duties of Chief Mechanical Inspector that were taken away from him.] He further stated the Building Department eliminated the Elevator Section which was very important and merged it with the Mechanical Section that lost employees who were not replaced. He went on to say there was a lot going on the Building Department that the Board was not aware of so he believed Mr. Hernandez proved his case.

Member Banos stated that he would have agreed with Member Moy's position if the department reduced Mr. Hernandez' pay [but that did not happen]. He went on to say if that were to happen in the future, Mr. Hernandez can bring his grievance to the Board. Member Banos further stated [based upon his comments made earlier], he was only saying the Board's responsibility was not to micro-manage departments but to read the Rule to determine whether or not the department was in violation of the Rule. He stated Mr. Hernandez was performing an easier job with a higher pay rate which is something he would be happy with, but that was just his perspective. He stated the burden was on Mr. Hernandez to prove his case and according to the reading of the rules he did not think Mr. Hernandez met his burden simply because his pay was not reduced and he maintained his same job title.

Member Moy stated the problem he had, which in his opinion was a red flag, was when the department brought in someone from the outside with the same title as Mr. Hernandez. He went on to say that the problem was coming because he had seen it happen before and that was to reduce Mr. Hernandez' pay and position for not performing the duties of his job.

Member Harris stated she believed Mr. Hernandez' purpose for coming before the Board was more than him having to conduct inspections. She went on to say she specifically asked Mr. Hernandez if he was called upon by the department to perform the duties of Chief Mechanical Inspector and also conduct inspections would he do so, and he responded in the affirmative with enthusiasm. Member Harris reiterated that Rule 14.10 is not only about the employee feeling that he was doing less, demeaning work but it is about bringing to light other things that are going on in the Building Department. She went on to say she believed the department was being mismanaged especially when it brought in an unknown part-time worker, where we do not know how much this worker was being paid, and having this same employee duplicate services [that were performed by Mr. Hernandez.] Member Harris further stated that an employee can hold a title and receive pay but if the City was not receiving performance commensurate with the title and pay, then it is a waste of City funds and this is not how the City should conduct business. She stated she believed the employee proved the City to be in violation of Rule 14.10.

Chairman Silverman stated he preferred to look at this case in a more narrow basis. He went on to say that it was not the Board's responsibility to tell the Building Director how to manage his department. Chairman Silverman further stated having heard the testimony, it was clear that Mr. Hernandez was demoted even though he received the same pay, (because) his duties were reduced. He stated this was a violation of Rule 14.10 and he felt the Board should recommend to the City Manager that Mr. Hernandez be returned to his duties as Chief Mechanical Inspector.

Special Counsel Everett stated that since this case was filed pursuant to Civil Service

Rules 16.1 and 16.2, she thought it would be helpful if the Chairman made a clarification of both rules so that when the Board voted, everyone would know what was being done. Considering Special Counsel Everett's suggestion, the Chairman read into the record the language contained in both rules. Following the reading of the rules into the record, the Chairman called for a motion as to the recommendation in this case. Member Banos made a motion to find that the employee did not meet his burden and that no further action be taken by the City Manager. The motion died for lack of a second.

The motion having failed, the Board entered a motion to find a violation of Rule 16.1, Investigation by the Board, which resulted as follows:

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

Aye: Silverman, Moy and Harris

No: Baños

The Board entered a motion to find under Rule 16.2, Complaint by Employee, that the department violated Rule 14.10, Reduction in Pay or Position, and to recommend to the City Manager that the employee be returned to his position and responsibilities of Chief Mechanical Inspector. The motion resulted as follows:

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

Aye: Silverman, Moy and Harris

No: Baños

H.2

Hearing of Appeal on behalf of Osmar Martinez, Police Officer, relative to his 160-hour suspension, effective January 11, 2013.

The Board entered into the scheduled hearing of appeal on behalf of Osmar Martinez.

Casey P. Cohen, Assistant City Attorney, represented the Department.

Eugene G. Gibbons, Attorney at Law, represented the Employee.

ACA Cohen presented opening statements and Attorney Gibbons deferred opening statements.

The Board moved to the calling of the department's witnesses. During direct examination, Attorney Gibbons raised an objection as to ACA Cohen's line of questioning and stated he wished to renew his objection that he made in his client's last case. He went on to say the department's case was built on information obtained unlawfully, which was basically "fruit of the poisonous tree" in that information was given to Sgt. Padron improperly and in violation of the Privacy Act of 1974, so he was asking that the Board rule on his objection. Hearing Attorney Gibbons' objection, Chairman Silverman denied his motion and stated the basis for his ruling is the Board has very relaxed rules of evidence. He went on to say if any Member wished to overrule his motion now was the time to do so.

Member Banos stated the Chairman had been handling matters before the Civil Service Board longer than he had so he had a lot of respect for the Chairman. He went on to say he would have felt better if some type of injunctive relief was sought because it bothered him to know that someone would go through a high level of searching (U.S. Customs) to the point of violating someone's privacy of information in order to make a case. Member Banos then moved to overrule the Chairman's motion for the purpose of

not allowing the City's exhibit into evidence as he believed it to have been obtained improperly or in some other fashion by the witness.

ACA Cohen asked to be heard on the objection. She went on to say that she opposed counsel's position that the information was obtained improperly in violation of the Privacy Act of 1974; however, she wanted to assure the Board that if Officer Martinez wanted to seek a remedy in the alleged Privacy Act violation, the remedy would not be against Sgt. Padron or the City, rather the Statute lays out his remedy as a civil remedy against U.S. Customs and Border Protection. ACA Cohen further stated the case law was clear that even if the information was obtained in violation of the Privacy Act, the remedy would not be to exclude the evidence.

Chairman Silverman asked Attorney Gibbons if he wished to say anything more on this issue. Attorney Gibbons responded in the affirmative and stated that he wished to comment on the matter of relaxed rules as stated by the Chairman. He went on to say that while the Board does have relaxed rules of evidence, it is fundamental principle of law of equity that if a party obtains information that he should not have otherwise been able to obtain, the evidence can be excluded based upon the fact that the information was illegally obtained. Attorney Gibbons further stated whether or not his client had a case against U.S. Customs for the leakage of information, this Board should be a protection and intervene itself to protect Officer Martinez and not allow the evidence.

After hearing arguments from attorneys and Members of the Board, Chairman Silverman asked Special Counsel if there was anything she wished to say before the Board voted on the motion to overrule his motion. Special Counsel Everett responded that the mission of this Board is to give due justice to both parties. She went on to say that there was the issue as to the appropriateness of how information was obtained and whether it should be used in further proceedings. Special Counsel Everett further stated her concern was that these issues could have been investigated and litigated, if necessary, prior to this hearing coming before the Board especially since this reprimand and [Officer Martinez] other reprimand [heard at the last meeting] were served on him some time ago. She stated by virtue of reading the language in the Statute, she did not know if the information was legally obtained or not, and that would go towards whether the information would be permissible in these proceedings. Special Counsel Everett went on to say that the mere fact that the information was illegally obtained did not necessarily mean it would be inadmissible in these proceedings because that certainly was not the law. She further stated without the issue being researched or perhaps resolved in another forum, it would be up to the Board to consider how necessary or fair the information was and whether it in any way compromises the ability of the employee to have this matter adjudicated.

Member Banos stated the basis for his motion to overrule the Chair primarily was because although he said he would have preferred the employee sought injunctive relief prior to the hearing, the Board was bordering on condoning the behavior of the supervisor [Sgt. Padron] which he felt should not be condoned. He went on to say the supervisor sought information without the release of the employee and used that information as a basis for reprimanding the employee so he felt prior steps should have been taken to obtain the information. Member Banos further stated whether the information should have been admissible in other proceedings or not, he was saying for purposes in this proceeding, [that the manner in which the information was obtained] unjustly prejudiced the employee and it creates a precedent that he did not want to create.

Member Harris stated she was not implying that Sgt. Padron obtained the information illegally, but she did not like how it was obtained. She asked ACA Cohen if she could prove her case without introducing the information in question. ACA Cohen responded

that she could still make her case but she did not think that should be the basis as to whether evidence was let in or not.

Following discussion, the Board entered a motion to overrule the Chairman's motion, which resulted as follows:

Motion by Member Baños, seconded by Chief Examiner Moy, that this matter be APPROVED. FAILED by the following vote.

Aye: Moy and Baños

No: Silverman and Harris

The motion having failed, Chairman Silverman stated rather than postpone this discussion to another day, he was changing his ruling to sustain the objection. He advised the department's attorney to refrain from asking her witnesses any questions about information obtained from U.S. Customs.

As instructed by the Chairman, ACA Cohen continued with direct examination. All witnesses were sworn in individually. Witnesses for the department appeared in the following order:

- 1. Sgt. Rolando Padron, City of Miami, Department of Police. Questions were posed by Board Members Baños and Harris during the testimony of Sgt. Padron.*
- 2. Osmar Martinez, Police Officer, City of Miami, Department of Police. Questions were posed by Board Member Harris during the testimony of Officer Martinez.*

The department rested its case and Attorney Gibbons moved for a Motion to Dismiss the Charges against his client. Chairman Silverman denied the motion and asked Attorney Gibbons if he had any witness testimony he wished to offer. Attorney Gibbons responded in the negative and rested his case. The Board proceeded to closing arguments and both attorneys presented their positions on the case. Following final argument, Member Harris stated she felt from Officer Martinez' direct testimony that he was not able to convince her that he was home; therefore, her vote will be based on her disbelief that Officer Martinez was home when he called out "I" (III) on three separate occasions, excluding the July 29 instance.

Following discussion, the Board entered a motion to find the Appellant GUILTY of Charge #1 - Departmental Order 1.11.6.17.2 - Disobedience. The motion resulted as follows:

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

Aye: Silverman and Baños

No: Moy and Harris

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

Motion by Chief Examiner Moy, seconded by Member Harris, that this matter be APPROVED. FAILED by the following vote.

Aye: Moy and Harris

No: Silverman and Baños

The Board entered a motion to find the Appellant GUILTY of Charge #2 - Conduct Unbecoming. The motion resulted as follows:

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

Aye: Silverman and Baños

No: Moy and Harris

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

Motion by Member Harris, seconded by Chief Examiner Moy, that this matter be APPROVED. FAILED by the following vote.

Aye: Moy and Harris

No: Silverman and Baños

The Board entered a motion to find the Appellant GUILTY of Charge #3 - Departmental Order 1.11.6.17.17 - Making False Statement. The motion resulted as follows:

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

Aye: Silverman, Moy, Baños and Harris

The Board entered a motion to find the Appellant GUILTY of Charge #4 - Departmental Order 1.11.6.41.2 - Making False Statement to a Superior. The motion resulted as follows:

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

Aye: Silverman, Moy, Baños and Harris

The Board entered a motion to find the Appellant GUILTY of Charge #5 - Departmental Order 1.11.6.41.3 - Filing False Report. The motion resulted as follows:

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

Aye: Silverman, Baños and Harris

No: Moy

The Board entered a motion to find the Appellant GUILTY of Charge #6 - Departmental Order 1.11.6.46.3 - Member Feigning Illness. The motion resulted as follows:

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

Aye: Silverman, Moy and Baños

No: Harris

The Board entered a motion to find the Appellant NOT GUILTY of Charge #7 - Civil Service Rule 14.2(e) 3 - Breach of Proper Discipline. The motion resulted as follows:

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

Aye: Moy, Baños and Harris

No: Silverman

The Board entered a motion to find the Appellant NOT GUILTY of Charge #8 - Civil Service Rule 14.2(e) 3 - Loss or Injury to the City. The motion resulted as follows:

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

Aye: Moy, Baños and Harris

No: Silverman

The Board entered a motion to find the Appellant GUILTY of Charge #9 - Civil Service Rule 16.2(b) - Misuse of Sick Leave Privilege. The motion resulted as follows:

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

Aye: Silverman, Moy, Baños and Harris

After consideration of all of the charges, Chairman Silverman asked if there was any Board Member that wished to change their vote on Charges #1 and #2 that resulted in a tie. Member Banos responded in the affirmative. Following discussion, the Board entered a motion to find the Appellant NOT GUILTY of Charge #1 - Departmental Order 1.11.6.17.2 - Disobedience. The motion resulted as follows:

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

Aye: Silverman, Moy, Baños and Harris

The Board entered a motion to find the Appellant NOT GUILTY of Charge #2 - Departmental Order 1.11.6.17.7 - Conduct Unbecoming. The motion resulted as follows:

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

Aye: Moy, Baños and Harris

No: Silverman

The Appellant having been found guilty of some of the charges, the Board entered into the Penalty Phase of Officer Martinez' hearing. The Board reviewed the Appellant's personnel file which revealed he received four letters of commendation from citizens and one reprimand during his tenure with the City of Miami Police Department.

Sgt. Rolando Padron, City of Miami, Department of Police, was recalled as a rebuttal witness on behalf the department. The department rested on rebuttal and the Appellant waived rebuttal.

Chairman Silverman called for Board discussion on the penalty. Member Harris stated she did not see the logic of how the department arrived at a 160-hour suspension and that it was too severe of a penalty if the department followed progressive discipline.

Member Banos stated on the issue of the penalty, he placed the burden of proof on the department and he felt the department met its burden. He went on to say he felt the department provided a couple of documents which had nothing to do with Officer Martinez' flight information, specifically the one where Officer Martinez wrote in response to a subpoena that he would not be in town for that time period, which to him was sufficient [proof that the department proved its case.] He went on to say that having said what he did about this case, he still felt there was a hint of a personality issue between Sgt. Padron and Officer Martinez. Member Banos further stated this was a repeated offense, but it seemed to him that the 160-hour penalty was an overkill and that he would be more inclined to recommending a 40-hour suspension in this case.

Following discussion, the Board entered a motion to recommend to the City Manager that Officer Martinez receive a 40-hour suspension in lieu of the 160-hour suspension imposed by the department director. The motion resulted as follows:

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

Aye: Moy, Baños and Harris

No: Silverman

Attorney Gibbons asked that the Board consider the matter of his client being carried "ww" (without wages) for the entire day because it was a part of the penalty and he did not understand how that was to be handled.

Member Harris stated the Board should have addressed the "ww" issue because it was a part of the penalty. She went on to say that although the Board found that Officer Martinez misused his "I" time, he still had ill time hours on the books that could have been used at the time the reprimand was issued to him. Member Harris further stated that rather than carry Officer Martinez without wages for the 4 days, the department should have used the "I" time hours from his balance. She stated in her opinion, it was double jeopardy to impose a 160-hour suspension without pay on the employee in addition to carrying him without wages four additional days so she thought the "ww" penalty for the four days should be eliminated.

Following discussion, the Board entered a motion to carry the Appellant "I" for four days in lieu of the 4 days of "ww" (without wages) given the Appellant had hours in his time balance to cover the "I" time usage. The motion resulted as follows:

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

Aye: Silverman, Moy and Harris

No: Baños

ADJOURNMENT:

The meeting ADJOURNED at 1:37 p.m. Breaks were taken at 10:29 - 10:56 a.m. and 11:49 - 11:55 a.m.

SIGNATURE:

Gerald Silverman, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary