

City of Miami

*City Hall
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Meeting Minutes

Tuesday, January 27, 2009

9:00 AM

Commission Chambers

Civil Service Board

*Miguel M. de la O, Chairperson
William J. Scarola, Chief Examiner
Jessica Angel-Capo, Board Member
Mariano Cruz, Board Member
Michael T. Dames, Board Member*

PLEDGE OF ALLEGIANCE

The meeting was called to order at 9:13 A.M. The roll call for Board Members at the commencement of the meeting was as follows:

Present: Chief Examiner Scarola, Chairperson de la O, Member Dames, Member Angel-Capo and Member Cruz

A. APPROVING THE MINUTES OF:

Regular Meeting of January 13, 2009.

The Board entered a motion to APPROVE the minutes of the January 13, 2009 meeting which resulted as follows:

Motion by Chief Examiner Scarola, seconded by Member Dames, to APPROVE. PASSED by the following vote.

Aye: Chairperson de la O, Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

B. PERSONNEL MATTERS

- B.1 08-01106** Copy of memorandum from Mariano Loret De Mola, Director, Code Enforcement Office, requesting to extend the probationary period of Cornelius Pierre, Code Enforcement Inspector, for an additional 60 days beyond January 27, 2009. (DISCUSSION)

Note: 2nd extension of probationary period.

Chairman de la O asked Code Enforcement Inspector Pierre if he was aware that the Department requested to extend his probationary period.

Cornelius Pierre appeared before the Board and responded in the affirmative.

Chairman de la O asked Mr. Pierre if he objected to the extension of his probationary period and he responded in the negative.

Member Cruz stated that this message is for all persons who want to become Code Enforcement Inspectors. He went on to say that when Code Enforcement Inspectors are out in the field working, they are not to become "cash register justice", but they should move towards compliance, which is one of the main [objectives] of a Code Enforcement Inspector. Member Cruz further stated that he has heard a lot of complaints about code enforcement issues, which he voices at City Commission meetings so he would ask again that these workers be fair (to residents when checking to see if they are in compliance with the City Code) before fining them.

Member Dames asked what the department's reason was for extending Mr. Pierre's probationary period.

Chairman de la O stated that according to the memo submitted by the department, Mr. Pierre's probationary period is being extended to allow time for him to acquire the F.A.C.E. Level 1 certification.

Member Dames asked Mr. Pierre if he missed an exam and he responded that he failed the exam by one point.

Following discussion, the Board entered a motion to APPROVE the department's request to extend Code Enforcement Inspector Cornelious Pierre's probationary period an additional 60 days beyond January 29, 2009 which resulted as follows:

Motion by Member Angel-Capo, seconded by Chief Examiner Scarola, that this matter be APPROVED. PASSED by the following vote.

Aye: Chairperson de la O, Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

B.2 08-01107

Copy of memorandum from Mariano Loret De Mola, Director, Code Enforcement Office, requesting to extend the probationary period of Maria Zeinc, Code Enforcement Inspector, for an additional 60 days beyond January 26, 2009. (DISCUSSION)

Note: 2nd extension of probationary period.

Chairman de la O asked Code Enforcement Inspector Zeinc if she was aware that the Department requested to extend her probationary period.

Maria Zeinc appeared before the Board and responded in the affirmative.

Chairman de la O asked Ms. Zeinc if she objected to the extension of her probationary period and she responded in the negative.

Member Dames asked Ms. Zeinc what the department's reason was for extending her probationary period and she responded that she missed the passing grade (for receiving her F.A.C.E. Level 1 certification) by two points.

Following discussion, the Board entered a motion to APPROVE the department's request to extend Code Enforcement Inspector Maria Zeinc's probationary period an additional 60 days beyond January 26, 2009 which resulted as follows:

Motion by Member Cruz, seconded by Member Angel-Capo, that this matter be APPROVED. PASSED by the following vote.

Aye: Chairperson de la O, Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

B.3 09-00084

Copy of memorandum from Mariano Loret De Mola, Director, Code Enforcement Office, requesting to extend the probationary period of Adan Fermin, Code Enforcement Inspector, for an additional 60 days beyond March 17, 2009. (DISCUSSION)

Chairman de la O asked Code Enforcement Inspector Fermin if he was aware that the Department requested to extend his probationary period.

Adan Fermin appeared before the Board and responded in the affirmative.

Chairman de la O asked Mr. Fermin if he objected to the extension of his probationary period and he responded in the negative.

Following discussion, the Board entered a motion to APPROVE the department's request to extend Code Enforcement Inspector Adan Fermin's probationary period an additional 60 days beyond March 17, 2009 which resulted as follows:

Motion by Member Angel-Capo, seconded by Chief Examiner Scarola, that this matter be APPROVED. PASSED by the following vote.

Aye: Chairperson de la O, Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

C. MILITARY LEAVES OF ABSENCE

D. DISCIPLINARY MATTERS

D.1 07-00801 Copy of a Judgment from the City Manager in the matter of Christiane Octave, Typist Clerk II, relative to her 16 hour suspension, effective June 11, 2007. (NOTIFICATION)

RECEIVED AND FILED

D.2 07-01476 Copy of a Judgment from the City Manager in the matter of Larry Walker, Heavy Equipment Operator, relative to his termination, effective November 26, 2007. (NOTIFICATION)

RECEIVED AND FILED

D.3 09-00083 Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Roberto Lores, Police Officer, of his 10-hour suspension, effective January 17, 2009. No appeal to date. (NOTIFICATION)

RECEIVED AND FILED

E. GENERAL ITEMS

E.1 06-00672 Copy of a joint Request for a continuance from Osnat K. Rind, Attorney, and Diana Vizcaino, Assistant City Attorney, concerning the hearing of appeal on behalf of Teresa Borkowski, Police Sergeant, relative to her 10-hour suspension, effective April 4, 2006. (DISCUSSION)

Hearing of appeal is scheduled for today.

Attorney Rind asked that Items E.1 (T. Borkowski), E.2 (T. Borkowski) and E.3 (F. Lubin) be continued (in order that the Board hear the grievance of Miguel Hervis).

Member Cruz stated that these cases have been continued too many times.

Chairman de la O stated that the Board would not have an opportunity to hear these cases today.

Assistant City Attorney Vizcaino responded that although Item E.1 was listed as a joint continuance, it was not. She went on to say that this item was scheduled on a previous agenda and at that time she and opposing counsel advised the Board that there was no way that they would get to these matters because they have two hearings scheduled today which are the cases of Lt. Miguel Hervis and Osian Cruz, which is a termination case.

Chairman de la O stated that Items E.1 through E.3 would be charged as a Board continuance because the Board will not have time to hear these cases today.

Member Scarola asked if one motion could be made for all three hearings that will be

continued. The Executive Secretary responded in the affirmative.

Following discussion, the Board entered a motion to CONTINUE the appeal hearing of Sgt. Teresa Borkowski and charge the continuance to the Board due to time constraints which resulted as follows:

Motion by Member Cruz, seconded by Member Angel-Capo, that this matter be APPROVED. PASSED by the following vote.

Aye: Chairperson de la O, Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

E.2 06-00965

Copy of a joint Request for a continuance from Osnat K. Rind, Attorney, and Diana Vizcaino, Assistant City Attorney, concerning the hearing of appeal on behalf of Teresa Borkowski, Police Sergeant, relative to her 10-hour suspension, effective May 24, 2006. (DISCUSSION)

Hearing of appeal is scheduled for today.

The Board entered a motion to CONTINUE the appeal hearing of Sgt. Teresa Borkowski and charge the continuance to the Board due to time constraints which resulted as follows:

Motion by Member Cruz, seconded by Member Angel-Capo, that this matter be APPROVED. PASSED by the following vote.

Aye: Chairperson de la O, Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

E.3 06-01632

Copy of a joint Request for a continuance from Osnat K. Rind, Attorney, and Diana Vizcaino, Assistant City Attorney, concerning the hearing of appeal on behalf of Fignole P. Lubin, Police Officer, relative to his 40-hour forfeiture, effective August 29, 2006. (DISCUSSION)

Hearing of appeal is scheduled for today.

The Board entered a motion to CONTINUE the appeal hearing of Fignole P. Lubin and charge the continuance to the Board due to time constraints which resulted as follows:

Motion by Member Cruz, seconded by Member Angel-Capo, that this matter be APPROVED. PASSED by the following vote.

Aye: Chairperson de la O, Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

E.4 06-01335

Copy of Findings of Fact concerning the appeal hearing of Debra Grant, Police Officer, relative to her 20-hour suspension, effective July 3, 2006. (DISCUSSION)

Deferred from the meeting of January 13, 2009.

NOTE: Chairman de la O was not in attendance when the Board conducted Officer Grant's hearing; therefore, he abstained from voting on these findings that pertain to her Civil Service hearing. Additionally, words in all "caps" represent changes to the findings that were approved by the Board.

Chairman de la O asked Assistant City Attorney Vizcaino if she reviewed the proposed findings that were submitted by Attorney Rind.

Assistant City Attorney Vizcaino referred the Board to page 2 and stated that she and Attorney Rind agreed to changing "2-3 minutes" that appear in finding #1 to "a few" so that the first sentence reads, "1. Appellant was A FEW minutes late for roll call on November 28, 2004." She went on to say that they also agreed to remove the word "When" that appears at the beginning of the third sentence and amend it so that it reads, "Appellant FURTHER TESTIFIED THAT SHE was unable to reach him prior to the start of her shift..." Assistant City Attorney Vizcaino further stated that she had an objection to adding the last sentence in finding #1 that reads, "Because of her attempt to comply with the instruction given to her by Sgt. Marshall, and based on what Sgt. Casiano said, Officer Grant reasonably believed that she did not have to hurry into work, and her brief tardiness was legitimate and excusable." She went on to say that the reason for her objection is she did not recall it being a finding from the Board nor did she recall it being a part of the evidence that was presented during the hearing.

Special Counsel Everett stated that she was present at the hearing and she knows that this was not the testimony as proposed by Attorney Rind. She went on to say that if counsel would before hand make argument and proposed findings and secondarily try to work these objections out prior to coming before the Board, the process would run so much smoother. Special Counsel Everett further stated that what is continually being done is (counsel) basically is making up reasons (for Board decisions) after the fact and it should not be done this way.

Following argument by both attorneys and discussion by the Board, the Chairman called for a motion to add the last sentence in finding #1 as proposed by Attorney Rind. Hearing none, the Chairman stated that it would not be added.

Assistant City Attorney Vizcaino referred the Board to finding #2, third sentence, which includes the date of November 30, 2004. She went on to say that she did not recall that specific date, but if that is the date that either the Board or Special Counsel recalled then she would have no objection to including it in the findings.

Following argument by both attorneys and discussion by the Board, the Board entered a motion to add the date to finding #2 so that sentence reads, "Appellant testified that Sgt. Marshall first told her on NOVEMBER 30, 2004 that she "might have to give the Lieutenant a late for roll call report on this." The motion resulted as follows:

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

Aye: Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

Abstain: Chairperson de la O

Assistant City Attorney Vizcaino stated that she also objected to adding the last sentence to finding #2, which states, "The Board credits Officer Grant's testimony." Following argument by both attorneys and discussion by the Board, the Board called for a motion to add that sentence as the last sentence in finding #2. Hearing none, Chairman de la O stated that this sentence would not be added.

Chairman de la O asked Assistant City Attorney Vizcaino if she had any objections to finding #6.

Assistant City Attorney Vizcaino responded that she objected to adding the last sentence which states, "The Board credits the testimony of Officer Grant."

Chairman de la O called for a motion to add the sentence, "The Board credits the testimony of Officer Grant." to the end of finding #6 as proposed by the employee.

Hearing none, Chairman de la O stated that the sentence would not be added in the findings.

Assistant City Attorney Vizcaino stated that she objected to adding all of finding #8 into the findings because it is not an accurate statement.

Following argument by both attorneys and discussion by the Board, the Board entered a motion to include finding #8 which states, "ALL OF THE DEPARTMENT'S WITNESSES CONFIRMED THAT POLICE OFFICERS DO NOT VIOLATE DEPARTMENTAL ORDER 1, CHAPTER 11, SECTION 11.6.18.6, TARDINESS, IF THEY HAVE A LEGITIMATE REASON FOR BEING LATE. THE BOARD FINDS THAT OFFICER GRANT HAD A LEGITIMATE EXCUSE FOR BEING A FEW MINUTES LATE AND THEREFORE HAS NOT VIOLATED THAT DEPARTMENTAL ORDER." The motion resulted as follows:

Motion by Chief Examiner Scarola, seconded by Member Angel-Capo, that this matter be APPROVED. PASSED by the following vote.

Aye: Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

Abstain: Chairperson de la O

Chairman de la O called for a motion to APPROVE the findings of fact as amended which resulted as follows:

Motion by Member Cruz, seconded by Member Angel-Capo, that this matter be APPROVED. PASSED by the following vote.

Aye: Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

Abstain: Chairperson de la O

F. REPORTS

F.1 09-00002 Pending Hearings as of January 27, 2009. (NOTIFICATION)

G. REQUESTS FOR HEARINGS

H. TODAY'S HEARINGS

H.1 07-01190 Continuation of the Investigation hearing on behalf of Stanley Jean-Poix and Andre Paul-Noel, Police Officers, pursuant to Civil Service Rule 16.1, Investigation by the Board concerning the Abuse of Power complaint against Sergeant Juan Casiano, Department of Police.

On December 2, 2008, December 16, 2008, and January 13, 2009, the Board convened to hear the grievance hearing on behalf of Officers Jean-Poix and Paul-Noel. Both attorneys rested their case at the hearing scheduled on January 13, 2009, but due to time constraints Board deliberations did not take place. At today's meeting, the Board proceeded with deliberations of this case.

Chairman de la O reminded those in attendance that he would not be voting because he only listened to a portion of the evidence; therefore, the four remaining Board Members would be voting on this case. He went on to say that ultimately the Board would need a motion to find whether there was an abuse of power or not and then asked

if there was any discussion from Board Members on the abuse of power issue.

Member Cruz stated that there was not 100% evidence presented to prove that Sgt. Casiano abused his power so whenever he has doubt about a case, he always vote in favor of the accused. He went on to say that there could have been a conflict of interest or a personality clash [between the officers and Sgt. Casiano], but in his opinion, that did not rise to the level of being an abuse of power; therefore, he was ready to make a motion to find that Sgt. Juan Casiano did not abuse his power as alleged by Officers Jean-Poix and Paul-Noel.

Member Dames stated that in a lot of ways he agreed with Member Cruz that there was not an abuse of power committed in this case. He went on to say that Sgt. Casiano was the supervisor of Officers Jean-Poix and Paul-Noel for only 27 days and the testimony he heard really did not meet the standard [of an abuse of power]. Member Dames further stated that Sgt. Casiano did not want to write commendations for the officers [as requested by Commander Whitehead] because he felt what they did was routine, but he felt the commendations should have been written and placed in their [official] personnel files especially since they are fine officers and they took a murderer off of the streets when they made a routine traffic stop. He stated that Fire Fighters receive commendations for saving lives from burning buildings and although a Fire Chief may see this as a routine part of a fire fighter's job, he still would write them a commendation; therefore, the officers should have received a commendation for performing a routine part of their job. Member Dames went on to say that since Sgt. Casiano was asked to write the commendations, he hope it was not too late for the officers to receive the commendation especially in light of what happened in the Liberty City area a couple of nights ago. He further stated that the Smith Family that testified made an impression on him, in particular the witness, Ms. Bobbie-Ann Smith. Member Dames stated that he knew it took a lot [of courage] for the father, Patrick T. Smith, to come forward and testify because he was very passionate about the situation involving his son and the two officers. He went on to say that he commends Sgt. Casiano because what he gathered [from the testimony] was Sgt. Casiano would be the first to step forward and say something if he felt an officer was mistreating the public so as far as the harassment charge [as alleged by the officers], he just did not see it.

Member Scarola stated that his thought was that there was a bigger issue going on between Sgt. Casiano and the two officers involved in this case. He went on to say that obviously there was a problem between Commander Whitehead and Sgt. Casiano from listening to their testimony and when Major Brown testified, he could see a battle line being drawn as to who supported who. He stated that as much as the officers felt they deserved a commendation, it is the supervisor's right to write or not write a commendation. Member Scarola went on to say that on June 5 Sgt. Casiano saw Officers Jean-Poix and Paul-Noel arrest a subject and then on July 2, he went to Internal Affairs (IA) to make a complaint against the officers, but what he found disturbing was when Sgt. Bohan of IA, interviewed Sgt. Casiano, he said, "We make these type arrests all of the time." He further stated that subsequent to this complaint, within six weeks these officers had a total of three IA complaints lodged against them reference the same thing. Member Scarola stated that with regards to the complaint handled by Lt. Tapanes, he went over and beyond in this instance by contacting the City Attorney's Office to get more information and Lt. Perez practically reviewed everything, but did no independent investigation of the complaint, which maybe he should have instead of taking things at face value. Member Scarola further stated that what troubled him about this case was when Sgt. Casiano conducted an inspection of the officers' vehicle at a shooting scene. He stated that there is a time and place to conduct inspections, but as a supervisor, conducting an inspection on a street or at a shooting scene would not be the place to do so. Member Scarola went on to say that in his opinion, the appropriate time would have been after roll call or during the end of a shift to

meet at a designated location. He stated that vehicle inspections are important and it is the duty of a supervisor to ensure that officers have the proper equipment in their vehicle to perform their job, but he questioned the timing Sgt. Casiano chose to perform the inspections, [which was at a shooting scene.] Member Scarola went on to say that Sgt. Casiano and the officers did work together prior to the incidents occurring, the officers were transferred to a specialized unit and obviously something happened, but was not fully revealed. He further stated that the entire problem that he sees is the City now faces a lot of lawsuits because all of the arrests that were made in the housing projects might be in jeopardy. Member Scarola stated that he believed very much in the [No Trespass] statute, that he was around at the birth of that statute, and that he is a signer on one of those statutes at his Homeowners Development, so he knows what can and cannot be done [when it comes to arrests.] He went on to say that in the past, he made several arrests in the housing projects that he knew were good arrests because he made sure that he or his officers had the back-up documentation, but on the other hand there is failure on the part of the department to provide documentation. Member Scarola further stated that there seemed to be a legal issue [on how arrests should be made in the housing projects] so he thought either the officers needed to be trained or [the department needed to] make sure officers have the right information. He stated that regardless of how minor a complaint might be, the supervisor that makes a complaint should not be the one investigating the complaint because then there is no room for partiality.

Member Angel-Capo stated that she saw a problem with the arrests, signage, and Sgt. Casiano's statement to IA concerning the way in which the Police Department handles arrests. She went on to say that she agreed with Member Scarola when he said that these issues were bigger than the two officers and Sgt. Casiano and that based upon the witnesses' testimony, it appeared everybody seemed to have issues with one another.

Member Dames stated that the officers testified that Sgt. Casiano solicited people to make complaints against them, but no one came forward [to prove what the officers alleged], which would have helped him [to vote in their favor], but all he got was the officers' word and no collaboration.

Following discussion, the Board entered a motion to find that there was no abuse of power as alleged by Officers Stanley Jean-Poix and Andre Paul-Noel which resulted as follows:

Motion by Member Cruz, seconded by Member Dames, that this matter be APPROVED. FAILED by the following vote.

Aye: Member Dames and Member Cruz

No: Member Angel-Capo and Chief Examiner Scarola

Abstain: Chairperson de la O

Chairman de la O stated that because there was a tie vote, the Board's options were either to continue deliberating to see if any of the Board Members would change their vote or send the report to the City Manager as a tie-vote.

Member Dames asked Member Scarola to tell him why he felt there was an abuse of power committed in this case.

Member Scarola stated that he thought Sgt. Casiano may have been used in this matter. He went on to say that Sgt. Casiano went to Internal Affairs and it is his right to do so; however, according to Sgt. Casiano's taped statement he mentioned that the officers wrote [the narrative] in the A-form as if they saw what occurred, but Sgt. Casiano never

questioned the officers as to what was written in the A-form, instead he went to IA and made a complaint against the officers. Member Scarola stated that the tools are used all the time for arrests and reiterated that what struck him as funny (about this case) was the officers mysteriously received three complaints within a relatively short period of time.

Member Dames asked Member Scarola to explain to him about the three complaints that he mentioned.

Member Scarola stated that the complaints made against the officers were filed on June 11, June 29, and July 2, 2007. He went on to say that Lt. Perez reviewed Sgt. Casiano's investigation package and tapes, but he did not ask additional questions instead he just listened to the tape and drew the same conclusion so in his opinion, what Lt. Perez did was not what he considered an investigation. Member Scarola further stated that reprimands were written on Officers Jean-Poix and Paul-Noel for different infractions, the reprimands were sent and signed off by the Police Major within a week's time, then they sat in limbo on someone's desk for some time, [and as the reprimands moved up the chain of command for signature], all of the sudden the reprimands were rubber-stamped in bold lettering, indicating that the 180 days for taking action on the reprimands had expired; therefore, the reprimands were no longer valid. Member Scarola went on to say that he thought that was wrong because the officers now have complaints that will remain in their personnel files although they were never issued to them and that was an abuse of power because the officers did not have an opportunity to fight the charges cited in the reprimand.

Member Dames asked if Sgt. Casiano was the cause of the reprimands not moving up the chain for signatures.

Member Scarola stated that he was not sure, but all together it was wrong. He went on to say that he was passionate about this issue because it happened repeatedly.

Member Cruz stated that in his opinion, this case was a matter of people working together and for whatever reason people began to complain, but he did not see an abuse of power.

Member Dames asked Member Scarola what rank he held in the police department. Member Scarola responded that he held the rank of police sergeant.

Member Dames stated that he agreed with Member Scarola about this case [and was going to change his vote].

Member Scarola stated that he listened to evidence, made mention of what he thought were improprieties in the case, so he did not want Member Dames to change his vote because of his rank, but because of what he felt in his heart.

Member Dames stated that he [decided to change his vote because] Member Scarola is from the Police Department, he understands the issues [that go on at the police department] and that Member Scarola pointed out some things that made him understand [the issue much clearer].

Following discussion, the Board concluded the investigation and entered a motion to find that Sgt. Juan Casiano abused his power against Police Officers Stanley Jean-Poix and Andre Paul-Noel, which resulted as follows:

Motion by Chief Examiner Scarola, seconded by Member Angel-Capo, that this matter be APPROVED. PASSED by the following vote.

Aye: Member Dames, Member Angel-Capo and Chief Examiner Scarola

No: Member Cruz

Abstain: Chairperson de la O

Chairman de la O asked if the Board wanted to deliberate and come up with a recommendation today or wait until the department and the employees proposed recommendations for the Board's consideration at a future meeting. Hearing none, Chairman de la O asked Special Counsel Everett for her position on the procedure the Board should follow.

Cynthia A. Everett, Special Counsel to the Board, responded that it really was the Board's pleasure, but it probably would be helpful to the Board if both attorneys prepared recommendations.

Chairman de la O asked if there were any objections from the department or employee to prepare recommendations.

Iliana Forte, Assistant City Attorney, appeared before the Board and responded that she was at a loss as to what recommendations Officers Jean-Poix and Paul-Noel could make since Sgt. Casiano no longer supervised them, the IA investigations were substantiated and closed, and that they did not receive any reprimands.

Chairman de la O stated that both sides would be submitting a recommendation and that one recommendation, for example, could be to terminate Sgt. Casiano, although he did not think anyone would make that recommendation, or no recommendation might be made at all, even though it was found by the Board that Sgt. Casiano abused his power.

Member Scarola stated that the recommendation could include the need for [the department to provide] officer training.

Chairman de la O stated that there are a number of recommendations that could be made and he was sure the department would not agree with most of the employee's recommendations, but the department might be able to work out other recommendations with the employee. He went on to say that this was not something that he thought the Board, department, or employee should come up with on the spur of the moment, but it needed to be given some thought. He asked Attorney Rind if she had an objection to what was proposed.

Attorney Rind responded in the negative. She went on to say that she would not argue one way or the other, but since the officers were available they probably wanted to say something about the remedy. Attorney Rind further stated that her only request would be that the Board listen to the remedy now, which would be taken directly from the officers, but if the Chairman was suggesting that she prepare something in the form of findings and a conclusion, she was not sure if that [was her clients' preference.]

Chairman de la O stated that he was not saying that the Board would not hear from the officers at the time, but he thought it would behoove everyone to contemplate what the proper remedy would be unless Attorney Rind had already thought it out and knew what recommendation to propose today. He went on to say that persons normally do not think that far ahead because they do not know whether they will win their case so he was giving everyone an opportunity to think about recommendations, make a proposal to the Board, and the officers and Sgt. Casiano definitely could speak to the Board at that time.

Attorney Rind asked if the parties could not agree to a recommendation, would the matter be taken up for discussion at an upcoming meeting.

Chairman de la O responded in the affirmative. He went on to say that he assumed that both sides were not going to agree because that would be hard to do; however, he thought that they could try to reach some agreement, but if not, the matter would be discussed and the Board would make a decision.

No other discussion took place on this matter.

H.2 07-00354

Grievance hearing on behalf of Miguel Hervis, Police Lieutenant, pursuant to Civil Service Rule 16.2, Complaint by Employee, concerning a violation of Civil Service Rule 17.1, Practices, Penalties.

Assistant City Attorney Vizcaino reminded the Board that at the April 10, 2007 meeting, the Chairman stated to Attorney Rind that the Board would make a finding, but not a remedy, in Lt. Hervis case unless she provided some authority or case law, but she has failed to produce any evidence or case law that would compel the Board to provide a remedy.

Chairman de la O stated that according to the minutes concerning Lt. Hervis' grievance, the Board determined that pursuant to Civil Service Rule 17.1, there would be no remedy because the Board could only impose a remedy on employees in the classified service. He went on to say that because the employee who allegedly violated Rule 17.1 was in the unclassified service, the Board was not going to impose a remedy unless Attorney Rind was able to find case law [that would afford her client] a remedy.

Attorney Rind stated that she would definitely argue that point if they prevailed in this case. She went on to say that there was a long discussion pursuant to a Motion for Clarification that she filed about that decision as it related to the difference between a Rule 16 and Rule 17 hearing, and the difference was that under Rule 17, the Board's determination is final and binding and under Rule 16 it is not.

Chairman de la O responded that he read the entire discussion about the Motion for Clarification that Attorney Rind referred to and he still would have to say that [the Board's decision] would be final as to the findings and conclusions, but as of yet, the Board did not know about a remedy, but they would cross that bridge.

Assistant City Attorney Vizcaino reiterated that the issue of whether or not there is a remedy, she thought the Chairman was very clear at the April 10, 2007 meeting when he asked Attorney Rind to provide him with some authority or case law so if [Attorney Rind] did have this information, she wanted an opportunity to review it prior to opposing counsel making argument. She went on to say that if Attorney Rind's basis [for a remedy] was pure argument, she thought all of the arguments were raised when this issue was addressed in 2007.

Chairman de la O stated that the Board needed to first have a finding of fact and then the Board could consider a remedy if it came to that point.

Following discussion, the Board entered into the grievance hearing of Lt. Miguel Hervis.

Osnat K. Rind, Attorney at Law, represented the Grievant.

Diana Vizcaino, Assistant City Attorney, represented the Department.

The Rule of Witnesses was invoked and Attorney Rind presented opening statements.

Assistant City Attorney Vizcaino reserved opening statements until after the employee rested his case.

All witnesses were sworn in individually. Witnesses for the Grievant appeared in the following order:

1. Miguel Hervis, Police Lieutenant, City of Miami, Department of Police.

Questions were posed by Board Members Dames and de la O during the testimony of witness Miguel Hervis.

The Grievant rested his case.

Assistant City Attorney Vizcaino presented opening statements.

Witnesses for the Department appeared in the following order:

1. Adam Burden, Assistant Chief, Administration Division, City of Miami, Department of Police.

Questions were posed by Board Members de la O, Cruz, Dames, Angel-Capo, and Scarola during the testimony of witness Adam Burden.

2. Tony Utset, Executive Assistant to the Police Chief, City of Miami, Department of Police.

Questions were posed by Board Members Cruz, Scarola, and Dames during the testimony of witness Tony Utset.

The Department rested its case and the Board proceeded to closing arguments that were presented by both attorneys.

Following final argument, the Board began deliberations of the case. Chairman de la O stated that he would begin with comments on the issue of standards. He went on to say that Attorney Rind indicated that the Board should use the McDonnell (McDonnell Douglas Corp. v. Green) test and the department's attorney said it should not be applied because this was not Federal Court. Chairman de la O further stated that if the Board did not apply the McDonnell test, then he was not sure what standards the Board was supposed to use. He stated that he certainly rejected using the standard that this case [should be decided in favor of the department, simply] because Police Chief Timoney denied that the reason Lt. Hervis was not promoted had nothing to do with his disability. Chairman de la O went on to say that cannot be the standard because those in power making employment decisions never admit that their decisions were made for discriminatory reasons and that is exactly why the Supreme Court came up with the McDonnell Test. He further stated that although the department was saying that he did not have any standard, he thought Attorney Rind was right that it would be the McDonnell test because it is a logical test. Chairman de la O stated that according to the McDonnell Test, if an employee was covered under one of the protected classes, was qualified to do a job, but felt discriminated against, it would be the department's responsibility to provide his/her reason for not selecting that person in order to prove whether or not the employer's action was discriminatory. He went on to say that the standard was incredibly easy to meet [in Lt. Hervis' case] and he would win his case because anyone could come up with a million reasons why the four lieutenants were appointed to NET Commander and Lt. Hervis was not. Chairman de la O further stated that there was an utter lack of rebuttal on the part of the department so he was glad that

Attorney Rind said in rebuttal, "It is not Assistant Chief Burden's fault." because, in his opinion, [Burden] was thrown into the line of fire and was very honest in saying that he did not make the decision. He stated that he asked and Member Scarola practically begged Assistant Chief Burden to tell the Board why Lt. Hervis was not qualified and the other lieutenants were when he did not make the decision; however, the department put Assistant Chief Burden on the stand to answer questions on this issue. Chairman de la O went on to say that he was sure that Assistant City Attorney Vizcaino had no choice of who to place on the stand to justify the Police Chief's decision so the department's only witness could not tell the Board why the decision was made. He further stated that Chief Timoney testified in a 19-minute declaration (to the City's Office of Equal Opportunity/Diversity Programs) and never once was he asked to justify his decision. Chairman de la O went on to say that Police Chief Timoney was asked one time [did his decision not to appoint Lt. Hervis] have anything to do with the fact that he was disabled and the Chief's response was, "Of course it didn't.", but the [Chief's response] was not going to cut it in court, so now the department is left defenseless to explain why other lieutenants were appointed [to NET Commander] and not Lt. Hervis. He further stated that if the other 52 lieutenants [in the department] were pregnant women, the fact that they were also not appointed would not mean that Lt. Hervis was not discriminated against because it may be that they all were discriminated against. Chairman de la O stated that the task was to look at who were appointed and compare their [credentials] against Lt. Hervis' to see if there was a reason for the difference. He went on to say that it did not matter whether Lt. Hervis was [on the police force] longer [than those lieutenants that were appointed] because all Chief Timoney had to say to the Board was that he worked with all of the lieutenants, but Lt. Hervis did not have those leadership skills that he was looking for and his attendance at the FBI Academy was not enough and there would have been nothing Lt. Hervis could have said to contradict that because it would have in fact been the Chief's decision, but there was no evidence. Chairman de la O further stated that on the first part of the McDonnell test it would be uncontroverted that Lt. Hervis was disabled because Executive Assistant Utset's memo discussed the fact that Lt. Hervis might not be able to perform the job [of NET Commander], Assistant Chief Burden's declaration had that discussion, and Chief Timoney said (in his testimony to EO/DP) that for years he had worries about Lt. Hervis' physical problems.

Chairman de la O stated that the second part of the McDonnell test was whether Lt. Hervis was qualified to do the job. He went on to say that Lt. Hervis had the experience and besides the fact that he had been with the department for a number of years, he has been a lieutenant for 6 years, had been the Acting NET Commander, has FBI certification, which alone was sufficient to give him the leadership education, and his evaluations were outstanding. Chairman de la O further stated that the Board learned that Assistant Chief Burden was on the committee that selected Lt. Hervis to attend FBI School, the highest evaluation scores that Lt. Hervis received were from Chief Burden, and that Chief Vega recommended that Lt. Hervis be promoted to NET Commander based upon (the transcript of) Chief Timoney's testimony. He stated that there was no evidence presented to prove that Lt. Hervis was not qualified for the job rather the only testimony the Board had that he might not be qualified came from Assistant Chief Burden, and he provided two reasons. Chairman de la O went on to say that Chief Burden testified that one reason Lt. Hervis was not qualified to be appointed was because he lobbied for the job, but he found that to be a contextual reason because on page 7 of Chief Timoney's declaration he said, "I was told about three or four other lieutenants who wanted to be promoted who had let me know through Chief Vega." He further stated that the lieutenants were lobbying for appointments through (now retired) Assistant Chief Vega, but it was not Chief Vega doing the recommending rather he was passing the message on to Chief Timoney; therefore, it was obvious that when persons wanted to be appointed, they let the Chief know of their interest through the Assistant Chief. Chairman de la O stated that the second reason Chief Burden gave was that Lt. Hervis lied, but he did not agree that he did because he found it incredibly difficult to

believe that nine days after Lt. Hervis was passed over [for appointment] for the second time and after he had written a lengthy memo regarding his meeting with Executive Assistant Utset about not being appointed that he would come face-to-face in a meeting with Police Chief Timoney and not raise the fact that he wanted to be appointed to NET Commander; so he believed (based upon the foregoing) that the McDonnell test was met in terms of circumstantial evidence.

Chairman de la O stated that whether there was direct evidence of discrimination, he was not going to go that far because he did not think the Board had to because there was indirect evidence of discrimination and secondly the evidence was not crystal clear. He went on to say that if he were to give credence to the hearsay testimony of (what Lt. Hervis said) Assistant Chief Vega said to him, then that is direct evidence and the City has a serious problem. Chairman de la O further stated that if Chief Vega were to testify, the evidence would have been very strong, but Assistant Chief Vega was not present so he obviously would not give it as much credit. He stated there certainly was direct evidence of discrimination and it certainly seemed to be on everyone's mind that Lt. Hervis was disabled with Parkinson's disease. Chairman de la O went on to say that one of the defenses the department could have put up was that Lt. Hervis was not qualified for the job, which would have been a legitimate defense. He further stated that the fact there was an ADA issue did not mean the department could not say that Lt. Hervis' disability prevented him from doing a certain job, but the department never came forward and took that position. Chairman de la O stated that if the department felt that was the case, they should have admitted to it although the fitness for duty examination seemed to indicate that it was not the case. He went on to say that he did not think it was a close call, but that it was obvious, based upon the lack of evidence from the department that Lt. Hervis was not appointed to NET Commander based upon his disability.

Member Cruz stated that when he initially reviewed this case, it really bothered him because all he could say to himself was, "Here we go again; the City made another mistake in violating Federal Law and it is costing us money." He went on to say that the Americans With Disability Act (ADA) is a Federal Law, the Federal Law supersedes State and City laws, and that the City went against Federal Laws which says that employers must accommodate employees with disabilities.

Member Scarola asked if Deputy Chief Fernandez' statement was ever entered into evidence. He went on to say that he asked the question because he wanted to know whether or not he could rely upon it [during deliberations.]

Chairman de la O stated that he thought it was, but he was being told that it was not, so Board Members would not be able to rely on Deputy Chief Fernandez' statement.

Member Dames stated that if anyone were to look at Lt. Hervis' career with the City of Miami Police Department, that person would have to wonder why Lt. Hervis was never appointed to NET Commander, but he knew the reason was because he had Parkinson's disease. He went on to say that Lt. Hervis had an outstanding record and that is what superiors should look for in officers when deciding who should be appointed. Member Dames further stated that he believed that Lt. Hervis was not appointed to NET Commander due to his physical ability which he drew from the statements recorded in depositions given by Police Chief Timoney and Assistant Chief Burden. He went on to say that Chief Timoney stated that he noticed Lt. Hervis had signs of [physical] problems in 2003 and that most lieutenants appointed to NET Commander worked in the Patrol Section, and Chief Burden stated that Lt. Hervis had physical difficulties and had to carry a gun.

Member Angel-Capo stated that when she asked Assistant Chief Burden about Lt.

Hervis, he [talked about him in the past tense] by saying things like, "He was a good officer" or "At that time...." She went on to say that (in responding to questions) Chief Burden stated that in his opinion Lt. Hervis did not demonstrate good character because he lied and lobbied for the NET Commander position. Member Angel-Capo further stated that she was well-informed about Lt. Hervis' disability, medication, and everything else that encompasses Parkinson's disease because her grandfather, who raised her had Parkinson's. She stated that Lt. Hervis' work record, leadership ability, persistence, dedication, and wanting promotional consideration showed in her opinion, excellent character as a person, a man and a police lieutenant of the City of Miami Police Department.

Member Scarola stated that he thought the Chairman hit all of the points [that he was going to cover]; however, he would say that according to Chief Timoney's deposition, it gave proof that the Police Chief received recommendations [for appointment] from others. He went on to say that he wished there was some type of criteria [the Board could review] as to what the Police Chief actually looked for in a candidate when he considered appointments because there were two people on the list that were assigned to City Hall for a long period of time before they became lieutenants and a short time later they were appointed to NET Commander. Member Scarola further stated that while Lt. Hervis had a very good background there may have been those who were appointed to NET Commander that may have had a better record than him, but there had to be a basis or benchmark that defined how the Police Chief selected those he appointed to NET Commander.

Following discussion, the Board entered a motion to find that there was a violation of Rule 17.1 based upon discrimination against Lt. Miguel Hervis due to his physical handicap, which resulted as follows:

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

Aye: Chairperson de la O, Member Dames, Member Angel-Capo and Member Cruz

No: Chief Examiner Scarola

Chairman de la O stated that (in accordance with Rule 16.2) the next step was to recommend a remedy, if any and asked Attorney Rind for her position on the remedy.

Attorney Rind stated that Rule 17 provides that, "Any person who violates the provisions of this rule, besides the legal penalties provided, shall be ineligible for appointment or employment in a classified position for such period as may be determined by this Board, and any classified employee of the City found guilty of violating this rule by the Board may be dismissed, suspended or demoted as the Board may determine." She went on to say that the provision that relates to classified employees would not apply to Chief Timoney since he holds an unclassified position, but she agreed that the Board could deem him ineligible for appointment to a position in the classified service. Attorney Rind further stated that the point is whether the Board could go beyond [ineligibility for appointment] and grant legal relief to Lt. Hervis and provided case law and argument as to why she felt the Board could.

Chairman de la O stated that he thought Attorney Rind was trying to say that the Board could come up with what the legal penalties should be, but then that would leave the word, "provided" [in Rule 17.1] without any meaning. He went on to say that the first sentence in Rule 17.1 talked about discrimination as being prohibited by statute. Chairman de la O further stated that when he read the phrase, "besides the legal penalties provided", he read it as besides the laws that are already in place that provides whatever penalty, that is, this provision does not preclude employees from

suing in court to get whatever (legal damages) they wanted, in addition they could get this [that's delineated in the rule.] Chairman de la O further stated that Attorney Rind needed to convince him that what he explained was not discussed in Rule 17.1, but he did not think she would convince him to change his mind because it was obviously talking about legal penalties that have already been provided, which he thought was referring to the State Discrimination Statute.

Attorney Rind read into the record the sentence in Rule 17.1 that reads, "Any person who violates the provisions of this rule, besides the legal penalties provided . . ." She went on to say that the Florida State Statutes and other statutes are not for violations of [Rule 17] and that the only entity that can make a decision on violations of this rule is the Civil Service Board so she believed what it was referring to in that sentence was that for violations of Rule 17.1, the Board is entitled to provide legal penalties in addition to the other things delineated in the rule, otherwise it would make no sense. Attorney Rind further stated that legal remedies include compensatory damages to Lt. Hervis and he was prepared to tell the Board how much compensation he lost since that time. She stated that without that phrase, the statement would read, ""Any person who violates the provisions of this rule shall be deemed ineligible for appointment . . ." so there has to be a reason why that language was included in the rule.

Chairman de la O stated that he thinks the language was included because it was saying that it was not to the exclusion of their remedies in court. He went on to say that the sentence could have been left out and the rule would have read, "Any person who violates the provisions of this rule shall be ineligible for appointment or employment in a classified position . . ." and then there may have been a question, although he doubts it, that when someone brings a claim under Rule 17, the person would now be barred from getting a double recovery by going somewhere else [to seek damages.] Chairman de la O further stated that he could not imagine any scenario under which what was provided in Rule 17.1 by the City Commission, was to give the whole panoply of damages and remedies that are provided for in local, county, state, and federal ordinances.

Attorney Rind stated that she did not think so because they are also entitled to give equitable remedies and that is not provided for in [Rule 17.1]. She went on to say that while the Commission might be saying that the Board is not entitled to promote as an equitable remedy, it would seem to her that the Chairman would be making those words superfluous in the paragraph [under Rule 17.1]. Attorney Rind reiterated that no court or entity would make a determination under Rule 17 other than the Civil Service Board.

Chairman de la O responded that he did not agree because that is exactly what a Federal lawsuit would be.

Attorney Rind stated that no other entity would make a determination under Rule 17, but they would make determinations of their own federal statutes and county ordinances.

Chairman de la O stated that it was all the same because Rule 17.1 includes discriminating on all of the same grounds that Title 7 covers. He went on to say that the whole point of Rule 17.1 is to penalize the wrongdoer, but it really is not to benefit the victim of the discrimination; however, Attorney Rind was asking the Board to add damages, which are not provided anywhere else in the Civil Service Rules. He stated that Attorney Rind may recall that the Board concluded that Rule 17 is one of the few Rules that are self-executing because the Board is not making a recommendation so now whereas the Board normally has to make recommendations based upon things such as reprimands, in this case the Board would be awarding damages and the City Manager would not have to approve it. Chairman de la O went on to say that [for this to happen], he thought it would be an incredible power grab by the Board so Attorney Rind would have to get an appellate court to compel the Board to do what she was asking.

He further stated that if the courts say that the Board has the power to award damages under Rule 17, he would certainly consider it but his thought was that the Commission would seek to take this authority from the Board if that were the case. Chairman de la O asked Attorney Rind if she had any other remedies.

Attorney Rind responded in the negative. She went on to say that if she understood the Chairman's determination, the only remedy the Board could provide would be to deem the Police Chief ineligible for holding any position in the classified service.

Chairman de la O stated that the Board must comply with that remedy because the rule states, "Any person who violates the provisions of this rule, besides the legal penalties provided, shall be ineligible for appointment or employment in a classified position for such period as may be determined by this Board. . ." He went on to say that the only person who could have violated the provision based upon the testimony the Board received is Chief Timoney because no one else made the decision (not to appoint Lt. Hervis to NET Commander).

Assistant City Attorney Vizcaino stated that she thought that even that reading of Rule 17.1 was inapplicable because the Police Chief does not hold a classified position so the Board could not pursue [this action] or deem the Police Chief ineligible.

Chairman de la O responded that he did not see why [this rule could not be applied] especially when the rule specifically says, "Any person who violates the provisions of this rule shall be ineligible for appointment or employment in a classified position for such period as may be determined by this Board." He went on to say that he does not write the rules, but it is saying that should the Police Chief decide to apply for a classified position in the future, he would be ineligible.

Assistant City Attorney Vizcaino stated that she thought that by reading the last sentence in Rule 17.1, it was subject to interpretation because it could lead a reasonable person to believe that the Board could only make that determination or hold someone ineligible if they held a classified position.

Chairman de la O stated that he respectfully believed that it was just the opposite because there is a comma before the phrase "and any classified employee of the City found guilty of violating this rule by the Board may be dismissed,....as the Board may determine.", which means that if a person is already a classified employee, the Board then has the power to dismiss, suspend, or demote the employee. He went on to say that the only situation that he could think of where this rule would (be most effective) is if there was a supervisor that was appointed to an unclassified position, and held a previous classified position, that person would not be eligible to [return to his/her former classification or apply to another] classified position for whatever period specified by the Board, if found in violation of Rule 17.1

Member Scarola stated that during his first term as a Board Member, he recalled the Board conducted a Rule 17 hearing and as a remedy, the Board issued a reprimand to a police lieutenant for a discriminatory practice because no one [in the department] wanted to do so.

Chairman de la O stated that he gave Attorney Rind his opinion on Rule 17, but if any other Board Member felt that the Board had the power to award damages under Rule 17, they should speak up.

Following discussion, the Board entered a motion that for five (5) years from today, Police Chief John Timoney shall be ineligible for appointment or employment in a classified position, which resulted as follows:

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

Aye: Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

No: Chairperson de la O

H.3 08-00892

Hearing of appeal on behalf of Osian Cruz, Automotive Equipment Operator II, relative to his termination, effective August 6, 2008.

Chairman de la O informed Attorney Mitrani that the Board would have to continue his client's hearing because there was not sufficient time to begin his case. He advised Attorney Mitrani that the Executive Secretary would be in touch with him reference rescheduling the case.

Isaac Mitrani, Law Offices of Cohen, Mitrani, Rynor & Adamsky, P.A., appeared on behalf of Attorney Cohen and stated that since Mr. Cruz has been out of work for some time, he would ask that his case be set for the next meeting.

Assistant City Attorney Vizcaino stated that before she could agree to a date, she needed to check if her witnesses would be available in two weeks.

Member Scarola stated that there are three meetings scheduled for next month so the Executive Secretary might be able to reschedule Mr. Cruz' hearing to one of those meeting dates.

Following discussion, the Board entered a motion to CONTINUE the hearing of Osian Cruz and charge the continuance to the Board due to time constraints. The motion resulted as follows:

Motion by Member Angel-Capo, seconded by Member Cruz, that this matter be CONTINUED. PASSED by the following vote.

Aye: Chairperson de la O, Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

H.4 06-00672

Hearing of appeal on behalf of Teresa Borkowski, Police Sergeant, relative to her 10-hour suspension, effective April 4, 2006.

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

CONTINUED

H.5 06-00965

Hearing of appeal on behalf of Teresa Borkowski, Police Sergeant, relative to her 10-hour suspension, effective May 24, 2006.

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

CONTINUED

H.6 06-01632 Hearing of appeal on behalf of Fignole P. Lubin, Police Officer, relative to his 40-hour forfeiture, effective August 29, 2006.

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.

**Motion by Member Angel-Capo, seconded by Member Cruz, to APPROVE.
PASSED by the following vote.**

Aye: Chairperson de la O, Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

The meeting adjourned at 5:18 p.m. Breaks were taken at 10:24-10:44 a.m., 12:04-12:18 p.m., 12:35-12:47 p.m., 1:12-2:16 p.m. (LUNCH), 2:20-2:30 p.m., and 4:04-4:11 p.m.

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary