

City of Miami

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

Tuesday, June 30, 2009

10:00 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 10:13 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 June 2, 2009.

The Board entered a motion to APPROVE the minutes of the regular meeting of June 2, 2009 which resulted as follows:

Motion by Chief Examiner Scarola, 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

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

- C.1 09-00686** Genesis Troutman, Park Ranger, requests active duty military leave without pay from May 24, 2009 through September 23, 2009. Copy of Orders submitted. (DISCUSSION)

The Board entered a motion to APPROVE Park Ranger Troutman's request for active duty military leave without pay 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: Chairperson de la O, Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

D. DISCIPLINARY MATTERS

- D.1 09-00694** Copy of a letter from Julie O. Bru, City Attorney, Office of the City Attorney, notifying Elena Gonzalez-Quevedo, Litigation Assistant, of her 5-day suspension, effective May 19, 2009. (NOTIFICATION)

NOTIFIED

- D.2 09-00695** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Carlos Deschamps, Police Officer, of his 20-hour suspension, effective June 6, 2009. (NOTIFICATION)

NOTIFIED

- D.3 09-00696** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Jerry Sutherland, Police Officer, of his 40-hour suspension, effective June 8, 2009. (NOTIFICATION)

NOTIFIED

- D.4 09-00697** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Vincent Jackson, Police Officer, of his 20-hour suspension, effective June 10, 2009. (NOTIFICATION)

NOTIFIED

- D.5 09-00698** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Stanley Winfrey, Police Officer, of his 10-hour suspension, effective June 7, 2009. (NOTIFICATION)

NOTIFIED

- D.6 09-00699** Copy of a letter from Chief F. Timoney, Director, Department of Police, notifying Johnny Brutus, Police Officer, of his 10-hour suspension, effective June 12, 2009. (NOTIFICATION)

NOTIFIED

- D.7 09-00700** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Marcel Jackson, Police Officer, of his 40-hour suspension, effective June 27, 2009. (NOTIFICATION)

NOTIFIED

- D.8 09-00701** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Christian Alvarez-Vega, Police Officer, of his 40-hour suspension, effective June 14, 2009. (NOTIFICATION)

NOTIFIED

- D.9 09-00704** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Bianca Joseph, Police Officer, of her 80-hour suspension, effective June 15, 2009. (NOTIFICATION)

NOTIFIED**E. GENERAL ITEMS**

- E.1 08-00896** Copy of Findings of Fact concerning the appeal hearing of Alice Dunn, Typist Clerk II, relative to her 40-hour suspension, effective October 20, 2008. (DISCUSSION)
Deferred from the meeting of June 2, 2009.
Chairman de la O asked the department's attorney if she had any objections or additions to the proposed Findings of Fact prepared by either the Board's Special Counsel or Attorney Rind.

Diana Vizcaino, Assistant City Attorney (ACA) on behalf of the department, responded that she had no objections concerning the findings prepared by Special Counsel Everett.

Chairman de la O stated that since the department's attorney expressed no objections

to the findings prepared by Special Counsel Everett, the Board would consider the proposed findings prepared by Attorney Rind, which is a duplicate of Special Counsel's findings that contains various changes proposed by the employee. He directed the Board to page 2 and asked ACA Vizcaino if she agreed to adding the following language in paragraph #2 under the Findings of Fact section of the report: "Sgt. Cherise Gause became a supervisor in the Records Section in THE FALL OF 2007." (NOTE: Wording in ALL CAPS indicates proposed language to be added or stricken.)

ACA Vizcaino stated that this language was included in Special Counsel Everett's version of the findings; therefore, she had no objection.

Chairman de la O asked Attorney Rind to present her next paragraph for which she either was asking that language be added or stricken.

Attorney Rind stated that she proposed changing the word "reading" to "looking" in paragraph #3 because Sgt. Gause testified that she came up behind Ms. Dunn and saw her for a second with a newspaper in front of her. She went on to say that she did not know if [this change] would make that much of a difference to the findings, but it certainly becomes important when it connects to her other suggested changes to the findings.

Chairman de la O asked for the department's position on the employee's request to change the word "reading" to "looking".

ACA Vizcaino stated that the word "reading" should remain in the findings and provided argument in support of her objection.

Chairman de la O called for a motion to replace the word "reading" with the word "looking" in paragraph #3 of the findings. Hearing none, Chairman de la O stated that finding #3 would remain as originally written. He asked Attorney Rind if she had any other changes she wished to make to the findings.

Attorney Rind responded in the affirmative, referred the Board to paragraph #6, and provided argument as to why she felt the following language should be included at the end of the sentence: "AND THE APPELLANT COMPLIED. APPELLANT LOOKED AT THE NEWSPAPER FOR LESS THAN TWO MINUTES."

Chairman de la O asked for the department's position.

ACA Vizcaino stated that she had no objection to adding the language proposed by the employee; however, she did object to using the word "looked" because according to Ms. Dunn's testimony she did not look at the newspaper, but she read the newspaper in order to find the (Miami) Heat's basketball score.

Chairman de la O asked Attorney Rind if she would object to the word "looked" being changed to "read".

Attorney Rind responded in the negative.

Following argument by counsel and discussion by the Board, Chairman de la O stated that paragraph #6 would read as follows: "Sgt. Gause instructed Appellant to continue working until the end of her shift, and the Appellant complied. Appellant read the newspaper for less than two minutes."

Chairman de la O asked Attorney Rind if she had any other changes.

Attorney Rind responded in the affirmative. She asked that the sentence, "THAT RULE WAS NOT ENFORCED IN THE RECORDS UNIT PRIOR TO SGT. GAUSE'S RECENT TRANSFER." be added to the end of paragraph #8, and provided argument in support of her position to add this language.

The Executive Secretary stated that this language was included in Special Counsel Everett's report.

ACA Vizcaino stated that [Special Counsel Everett's report] reads "that upon testifying that the rule was not enforced." so she had no objection to paragraph #8.

Attorney Rind stated that every time the phrase, "the Appellant testified" is used in the findings, then it is not clear that it is something that the Board has adopted as fact. She went on to say that it is actually not important to state in the findings who testified, but what is important is to know what the Board found as a fact in these proceedings.

Chairman de la O asked Attorney Rind if she was asking that the phrase, "THE APPELLANT TESTIFIED THAT" be stricken so that paragraph #8 reads, "The rule was not enforced in the Records Unit prior to the recent transfer."

Attorney Rind responded in the affirmative.

ACA Vizcaino responded that the proposed change to paragraph #8 as requested by Attorney Rind was not accurate because the Board did not hear from every supervisor in the Records Unit and the Board did not know whether the rule was enforced or not. She went on to say that it was an allegation made by opposing counsel and there was nothing offered to corroborate her allegation.

Attorney Rind responded that it was not that it was an allegation made by her, but Ms. Dunn testified to this matter and since the department did not put on testimony to refute what her client testified to, it stands unrefuted.

Special Counsel Everett stated that it might stand unrefuted in terms of the testimony, but it was not a finding by the Board. She went on to say that because of Attorney Rind's request and the ultimate conclusion of the Board to take certain factors into consideration because of the discipline, that is why she wrote the finding in that way.

Following argument by counsel and discussion by the Board, the Board entered a motion to strike the phrase, "THE APPELLANT TESTIFIED THAT" from paragraph #8.

Under discussion, Member Dames stated that his personal opinion was that he thought it was standard practice [that employees read literature while on duty.]

Following discussion, the motion on the floor 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 and Member Cruz

No: Chairperson de la O and Chief Examiner Scarola

ACA Vizcaino stated that with all due respect to Member Dames, she would ask that the Board base its decisions on the evidence and/or sworn testimony presented when considering [what to include in the Board's] findings of fact, and not on a personal opinion of what a Board Member thought might or might not have happened.

Chairman de la O stated that he thought Member Dames was being clear when he

based his decision on the testimony he heard, which gave him the impression that [reading on duty] was something that was going on all of the time [without the rule being enforced.] He went on to say that whether this was the case, the Board did not know, and could only go based on the testimony that was presented, so he did not think Member Dames was trying to present divine knowledge other than what was presented.

Chairman de la O asked Attorney Rind if she had any other changes she wished the Board to consider.

Attorney Rind responded in the affirmative and provided argument in support of her position to add paragraph #9 which states, "THERE IS NO EVIDENCE THAT APPELLANT WAS NEGLIGENT OR DISREGARDED HER DUTIES. TO THE CONTRARY, THE EVIDENCE ESTABLISHED THAT MS. DUNN IS HARD-WORKING AND THAT SHE PROCESSED HUNDREDS OF REPORTS ON THE DAY IN QUESTION. NO WORK FAILED TO GET DONE BECAUSE MS. DUNN BRIEFLY READ THE NEWSPAPER WHILE WAITING FOR THE FRONT DESK TO CLEAR."

Chairman de la O asked for the department's position on adding paragraph #9 as proposed by the employee.

ACA Vizcaino stated that paragraph #9 was not only self-serving, but the Board made a finding that Ms. Dunn was not guilty of neglect. She went on to say that if the Board chooses to consider one side of the story and make findings of fact based on this, it was over her objection.

Following discussion, the Board entered a motion to add paragraph #9, which resulted as follows:

Motion by Member Angel-Capo, seconded by Member Cruz, 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

Attorney Rind stated that she did not agree with the way paragraph #10 was written, thought that it was irrelevant, and should be stricken. She went on to say that as a matter of fact, the department did not enforce its rules and that is what the Board found in the previous paragraph.

Chairman de la O asked for the department's position on the employee's request to strike paragraph #10.

ACA Vizcaino responded that not only was paragraph #10 relevant, but Attorney Rind was proposing to add language that the departmental order had never been enforced and that paragraph #12 was an accurate statement in that there was no evidence that the department selectively enforced Departmental Order 1.11.6.13.13 - Reading on Duty. She went on to say that Ms. Dunn's allegation that the departmental order had never been enforced was insufficient so she did not see why this should be stricken when opposing counsel proposed that similar language be added.

Special Counsel Everett stated that there is a difference between the level of enforcing: not enforcing, and selective enforcement. She went on to say that obviously the Board will add or strike language in the findings as it deems appropriate, but there was argument or an inference that Sgt. Gause may have been picking on Ms. Dunn and then there was the issue of whether she was selectively enforcing the departmental order during her tenure as the supervisor assigned to the Records Unit versus whether the

department enforced [the departmental order] over time.

Attorney Rind stated that what Special Counsel Everett explained was definitely different than what she wrote in the findings.

Chairman de la O stated that selective enforcement would be if the department saw one person [reading on duty] and decided not to enforce the rule against that person, but [enforced it] against another person, but he was not sure that the Board heard any testimony like that. Chairman de la O called for a motion to strike paragraph #11 from the report prepared by Special Counsel Everett as requested by the employee, which resulted as follows:

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

Aye: Member Dames, Member Angel-Capo and Member Cruz

No: Chairperson de la O and Chief Examiner Scarola

Chairman de la O asked Attorney Rind if she had any other changes.

Attorney Rind responded in the affirmative. She went on to say that under the Conclusion of Law section of the report, page 3, she was requesting to add the following sentence after the first sentence in the second paragraph: "A 40-HOUR SUSPENSION IS EXCESSIVE GIVEN THE FACT THAT APPELLANT IS NOT GUILTY OF THE MAJORITY OF THE CHARGES, THAT SHE PROCESSED HUNDREDS OF REPORTS THAT DAY, THAT SHE READ THE NEWSPAPER FOR LESS THAN TWO MINUTES, AND THAT DEPARTMENTAL ORDER 1, CHAPTER 11.6.13.13 HAD NOT BEEN ENFORCED IN THE RECORDS UNIT IN THE PAST." Attorney Rind further stated that she thought this sentence should be added so that the City Manager would know why the Board recommended the level of discipline that it did.

Chairman de la O asked for the department's position.

ACA Vizcaino responded that she objected to the proposed sentence in its entirety because it was completely unnecessary. She went on to say that Attorney Rind's opinion that the 40-hour suspension is excessive is something the Board considers during deliberations and its findings and recommendations are forwarded to the City Manager, who will make a decision based upon substantial and competent evidence. ACA Vizcaino further stated that not only was this sentence unnecessary, but an opinion is not a conclusion of law.

Chairman de la O asked if the recommendation for discipline represents the Board's conclusion of law.

Special Counsel Everett responded that it was separate.

Following discussion, the Board entered a motion to amend the second paragraph under the Conclusion of Law to read, "The Board recommends that the Appellant receive a reprimand. A 40-hour suspension is excessive given the fact that Appellant is NOT GUILTY of the majority of the charges, that she processed hundreds of reports that day, that she read the newspaper for less than two minutes, and that Departmental Order 1, Chapter 11.6.13.13 had not been enforced in the Records Unit in the past." The motion resulted as follows:

Motion by Member Angel-Capo, 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

The Board entered a motion to APPROVE the Findings of Fact and Conclusion of Law as amended, which resulted as follows:

Motion by Member Angel-Capo, seconded by Member Cruz, 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 09-00594

Copy of a Report concerning the Investigation hearing on behalf of Victor Cornier, Materials Specialist Supervisor, General Service Administration, pursuant to Civil Service Rule 16.1, concerning an alleged violation of 14.6, Resignation before Appeal. (DISCUSSION)

Chairman de la O asked the department's attorney if she had any objections to the proposed findings of fact.

ACA Vizcaino responded that while she had no objections to Special Counsel Everett's proposed findings; she did however, would request that "Police Department" that appears in the first sentence of the second paragraph on page 1, be changed to "Department of General Services Administration" since this was the department she represented at the time of the hearing.

Chairman de la O stated that this change would be made and asked ACA Vizcaino if she had any other corrections or changes to the findings.

ACA Vizcaino responded in the negative.

Chairman de la O asked Attorney Guttman-Valdes if she had any changes or corrections concerning the findings.

Attorney Guttman-Valdes responded that while they had no objections to the findings, she wanted the record to reflect that their position is that a retirement is equivalent to a resignation.

Following discussion, the Board entered a motion to APPROVE the Findings of Fact as amended, 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: Chairperson de la O, Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

E.3 08-00870

Copy of a Report concerning the Investigation hearing on behalf of Amelia Pritchard, Administrative Assistant I, Department of Fire Rescue, pursuant to Civil Service Rule 16.1, Investigation by the Board. (DISCUSSION)

Chairman de la O asked the department's attorney if she had any objections to the findings and recommendations as currently proposed. [Wording in ALL CAPS represents language requested to be either added to or stricken from the findings].

ACA Vizcaino responded in the affirmative and directed the Board to page 1, second paragraph, second sentence, which states, "HER FOREIGN BACHELOR'S DEGREE WAS REJECTED." She went on to say that this language should be deleted and provided argument in support of her objection.

Teri Guttman-Valdes, Attorney at Law on behalf of Amelia Pritchard, stated that she felt the language should be included based upon her client's testimony that she had her bachelors degree, presented it [to an employee] at the Employment window, and it was not accepted.

Following argument by both attorneys and discussion by the Board, Member Cruz made a motion to delete the language as proposed by the department's attorney; however, it DIED FOR LACK OF A SECOND. Chairman de la O stated that the sentence, "Her foreign Bachelor's Degree was rejected." will remain in the findings. He asked the department's attorney if she had any other objections.

ACA Vizcaino responded in the affirmative and directed the Board to page 2, finding #1, last line of the sentence which states in part, "HAS EVER HELD THE TITLE OF PAYROLL SPECIALIST." She went on to say that she objected to including this language because her recollection of the evidence was that there was someone in the City who previously held the position of Payroll Specialist; however, that person retired and the position was reopened.

Chairman de la O asked for the employee's position on the department's objection.

Attorney Guttman-Valdes responded that she seemed to recall that someone else did hold the position of Payroll Specialist; therefore, her suggestion would be that the last part of the sentence read, "AS THERE IS ONLY ONE PERSON WHO WAS CURRENTLY HOLDING THE POSITION OF PAYROLL SPECIALIST AT THE TIME OF [RECRUITMENT FOR THE POSITION.]"

Following argument by both attorneys and Board discussion, the Chairman stated that since there was an agreement between both attorneys that someone else held the position of Payroll Specialist, the language would be amended to read, "AS THERE IS ONLY ONE PERSON WHO CURRENTLY HOLDS THE TITLE OF PAYROLL SPECIALIST."

Chairman de la O asked the department's attorney if she had any other objections.

ACA Vizcaino responded in the affirmative and referred the Board to page 2, second paragraph, third line, and provided argument in support of objection to adding the following sentence which states, "NO EVIDENCE WAS PRESENTED TO ESTABLISH THAT THIS REQUIREMENT WAS NECESSARY IN ORDER TO SUCCESSFULLY PERFORM THE JOB OF PAYROLL SPECIALIST FOR THE CITY OF MIAMI."

Attorney Guttman-Valdes proposed to add the word "COMPELLING" before the word "evidence" in paragraph #2.

Chairman de la O stated that he was going to suggest adding the phrase, "no competent evidence" because there was evidence, but not enough to establish [that the requirement was necessary to successfully perform the job of payroll specialist.]

Following argument by counsel and discussion by the Board, the Chairman stated that the sentence would be amended to read, "No competent evidence was presented to establish that this requirement was necessary in order to successfully perform the job of Payroll Specialist for the City of Miami." He asked the department's attorney if she had

any other objections.

ACA Vizcaino responded that she had no other objections under the Findings of Fact section of the report, but she did; however, like to add language concerning the Chief Examiner's investigative report of which the Chief Examiner found there to be no violation by the department as alleged by Ms. Pritchard.

Chairman de la O called for a motion to add a paragraph referencing the Chief Examiner's prior investigatory report as proposed by the department. Hearing none, Chairman de la O stated this information would not be included. He asked the department's attorney if she had any other objections.

ACA Vizcaino responded in the affirmative and directed the Board to page 3 and stated that she had an objection to including Recommendations 3 through 6 as proposed by the employee.

Chairman de la O asked the employee's attorney if she had any objections to the proposed report or wished to propose any additions to the report.

Attorney Guttman-Valdes responded that she only wished to make grammatical changes to proposed Recommendations 3 through 6.

Chairman de la O stated that his understanding of the [Recommendations portion of the report] was that Special Counsel Everett drafted the first two recommendations and that she included Recommendations 3 through 6 as requested by the employee, but she did not take a position one way or the other with regards to the employee's proposed recommendations. He went on to say that the Board needs to decide whether to include all or some of the recommendations that were proposed by the employee or go with recommendations 1 and 2 that were drafted by Special Counsel Everett. Chairman de la O asked Attorney Guttman-Valdes to explain her thought process for proposing the four recommendations.

Attorney Guttman-Valdes responded that in order to remedy the violation and the improper changing of the qualifications, she felt that the Assistant Supervisor of Payrolls position should be re-announced under the previous requirements and that the City should accept applications for a reasonable period and determine which individuals meet the qualifications, and conduct the interviews in accordance with Labor Management Policy 3-92. She stated that the person selected to fill the job should be paid retroactively to the date the position was filled.

Chairman de la O asked Attorney Guttman-Valdes if she was asking that the position be re-opened, re-announced, and refilled.

Attorney Guttman-Valdes responded in the affirmative.

Member Angel-Capo stated that she had a concern with regards to Recommendation #6. She went on to say that if a non-City employee were to get the job of Assistant Supervisor of Payrolls, she did not think it would be practical to compensate that individual retroactively to the date the position was filled especially since that individual was never a City employee.

Chairman de la O stated that the Board could refuse to include Recommendation #6 in the report. He asked for the department's position on Recommendations 3 through 6.

ACA Vizcaino stated that she objected to including Recommendations 3 through 6 because she felt it would be improper for the Board to make a recommendation asking

that a new position be created and that she would argue that it was beyond the Board's authority to make recommendations as to which positions need to be open or created and how they are to be filled. She went on to say that the Assistant Supervisor of Payrolls position that was previously posted went through a competitive process, the position was filled, and there is no other budgeted Assistant Supervisor of Payrolls position available to be filled.

Attorney Guttman-Valdes stated that there was nothing in her proposed list of recommendations that would preclude the incumbent from reapplying and competing for the position. She went on to say that originally the requirements were too limited and that is why she wants to right the wrong.

Member Dames stated that Ms. Pritchard has a bachelors degree and 19 years of service as a City employee and the person who got the Assistant Supervisor of Payrolls position only qualified because she held the position of Payroll Specialist; therefore, he felt Ms. Pritchard was wronged and he wanted to know how the Board could make it right.

Chairman de la O stated that someone could correct him if he was wrong, but he thought the testimony was that even if Ms. Pritchard's degree was accepted, she would not have met the requirements of the job because she did not yet have her foreign degree evaluated to determine its U.S. equivalency. He went on to say that the Board criticized the way the requirements were set, but under those requirements Ms. Pritchard did not qualify.

Member Dames stated that the testimony was that Ms. Pritchard's degree was not accepted.

Chairman de la O stated that if the degree was accepted, she still would not have qualified because it was a foreign degree and she did not have it evaluated.

Attorney Guttman-Valdes stated that if the requirements were not changed, Ms. Pritchard would have qualified.

Chairman de la O stated that he wanted to make sure everyone understood the facts as they were presented. He went on to say that based upon the job announcement that was posted, Ms. Pritchard did not qualify [for the Assistant Supervisor of Payrolls position.]

Attorney Guttman-Valdes stated that she believed Ms. Pritchard's degree was presented and authenticated [when she applied for prior positions.]

Chairman de la O stated that he did not recall that being the testimony. He went on to say that he also did not recall how he voted, but he thought he voted that it was arbitrary and capricious [the way the requirements were set], but Ms. Pritchard had not been harmed, per se, (because) she did not qualify for the position, but that the City needed to look at the requirements, and set the bar lower so that they could have interviews with more people. Chairman de la O further stated that the real problem was the requirements that were set and not that Ms. Pritchard's application was [allegedly] rejected. He stated that rejecting degrees would be troubling on its own and the Board would not want to have degrees rejected at the window, but that was not the cause for [Ms. Pritchard's ineligibility for the Assistant Supervisor of Payrolls position.]

Member Cruz stated that he often wondered how many cases like this case were out there especially since people are either afraid to come forward or do not know their rights.

Chairman de la O stated that the question for Board Members is do they believe that the restrictions [for employment eligibility for the Assistant Supervisor of Payrolls position] were arbitrary, capricious and too narrowly drawn that the City Manager should essentially reopen the Assistant Supervisor of Payrolls position and give everyone a fair chance to interview with the possibility that the employee currently in the position could be replaced, or did the Board just want to consider Recommendations #1 and #2 which is that in the future the department needs to be more careful as to how it sets employment requirements.

Attorney Guttman-Valdes stated that the Board's function is to be the watchdog because if there is no recommendation that the department fix the requirement, the department will continue to do things that are arbitrary and capricious.

ACA Vizcaino stated that the recommendations that should be included in the findings are what the Board's attorney drafted in paragraphs #1 and #2 on page 3 of her report.

Following discussion, the Board entered a motion to accept the employee's proposed recommendations [#3 through #6].

Under discussion, Chairman de la O asked Member Dames if he would consider amending his motion to exclude Recommendation #6 because he did not see compensating a person retroactively who never performed the job.

Member Dames responded in the affirmative.

Chairman de la O stated that his point with Recommendation #6 was Ms. Pritchard was not the only one potentially hurt, but she was the one who spoke up and may get a change to the process, but there may have been others who did not apply because of the way the requirements were set up so this is why he did not think it would be appropriate to make an exception for Ms. Pritchard. He went on to say that retroactive compensation has to be done for all or none in order to be fair. Chairman de la O further stated that someone is currently doing the job and is being paid so if Recommendation #6 were to remain in the report, the Budget Department would also have to pay the person retroactively who never performed the job so he thought it would be more responsible to fix the process and not get involved with the compensation.

Following discussion, the Board entered a motion to include Recommendations #3 through #5 as proposed by the employee. The motion resulted as follows:

Motion by Member Dames, seconded by Member Cruz, 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

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

Ryan Alexander, Building Inspector III, relative to his 5-day suspension, effective March 21, 2008. (DISCUSSION)

Hearing of appeal is scheduled for today.

Osnat K. Rind, Attorney at Law on behalf of Ryan Alexander stated that her client was an Aide in Commissioner Sarnoff's office in 2007. She went on to say that the underlying facts are not important for purposes of this Summary Judgment Motion but in March 2008, Mr. Alexander was disciplined by the Assistant City Manager which violated the City Charter. Attorney Rind further stated that she provided very clear case law so she did not think the department's attorney would object since it is clear that the department director or the City Manager has to issue discipline.

Attorney Rind stated that since filing her motion of which she sent a copy to the department's attorney on June 25, 2009, it appeared that on June 26, 2009, the City Manager took a copy of the 2008 disciplinary letter that was issued to her client and crossed out the date of March 28, 2008 and wrote in a new date of June 26, 2009, then signed the disciplinary letter. She went on to say that the question for the Board is what to do given the fact that the City Manager had taken this action. Attorney Rind further stated that she read case law on this particular issue which stated that City rules, ordinances, and charters have to be complied with especially cases dealing with disciplinary actions. She stated that it appeared to her that the courts were not viewing the defects and violations of the ordinances and procedures as procedural due process violations but as substantive due process violations, and she presented case law of the City of Hialeah vs Stoler in support of her argument. Attorney Rind stated that in this case before the Board today, she thought it would be disingenuous to think that on June 26, 2009, the City Manager gave any real reason to the underlined facts of this case rather the City Manager did what it looks like he did, which was make a photocopy of a letter that was prepared and signed off by his Assistant City Manager and then [sign it with a new date], which she would submit does not cure this defect, if indeed it could be cured. She went on to say that she believes that employees have the right to have the underlined facts considered by a department director or the City Manager and in good faith. Attorney Rind further stated that what the City Manager did was cynical and that it made a mockery of the Charter provision so she thinks that it would strain credulity if the City Manager did any real, genuine consideration of the facts, violations and accusations in signing off on the next day his name to a disciplinary letter that had already been drafted.

Chairman de la O responded that the question was whether the City Manager did any investigation or gave it even a second thought [because if he did], that would preclude summary judgment. He went on to say that the Board needs to find out whether or not the City Manager did any investigation [prior to signing off on the disciplinary letter] and that testimony would have to be taken on the Motion for Summary Judgment. Chairman de la O further stated that if the rule is the City Manager cannot change a disciplinary letter a year later, Attorney Rind could then have the ability to get summary judgment if she could make that argument since there is no support for this argument. He stated that if the task was more "touchy-feely" in as much as did the City Manager really review the matter or give substantive due process, that precludes summary judgment; therefore, the Board would need to know what steps did the City Manager take to see if he provided substantive due process. Chairman de la O stated that what he thinks should be done is to give everyone an opportunity to review the matter in light of this new development because there might be case law out there that says that a year later the City Manager or department director cannot change the name of the entity issuing the discipline of the party, and then there would be a summary judgment otherwise it sounded like the Board would have to have a hearing to find out from the City Manager

what he did and did not consider, and make a determination assuming there was a substantive due process right. He went on to say that the Stoler case law presented by Attorney Rind was short and did not give the Board much thought and incite into what the Third District Court of Appeals was thinking, but Attorney Rind maybe able to find other jurisdictions that address this matter of substantive due process right, but he just did not see how it was a summary judgment at this point.

ACA Vizcaino stated that Attorney Rind made the presentation that back pay was awarded in the Stoler Case; however, that was not in the case law because all that it mentioned was that a summary judgment was entered in favor of the plaintiff. She went on to say that for clarification purposes, Attorney Rind faxed her motion late last Thursday and corrective measures were immediately taken. ACA Vizcaino further stated that Mr. Alexander was not at work yesterday; therefore he was not served with the revised disciplinary letter and that his attorney (Rind) indicated that she would accept service and she was handed a copy of the letter this morning. She stated that in compliance with the Police Officers Bill of Rights, police officers have to be disciplined within 180 days; however, general employees do not have that provision; therefore, even if the Board were to make a ruling that the letter was inefficient, there would be nothing to prohibit a department director or the City Manager from reissuing that discipline based upon the same grounds and set of circumstances. ACA Vizcaino went on to say that the remedy Attorney Rind is seeking is inappropriate because there was a procedural defect that was amended and revised in order to comply with the City's Charter and Civil Service Rules and Regulations.

Member Cruz stated that when he received his agenda packet, he read the agenda items for consideration at today's meeting and when he came upon Attorney Rind's Motion on the agenda, he immediately took out his Civil Service Rule Handbook and read Rule 14.1. He went on to say that Rule 14.1 indicated that discipline would be issued by either the department director or City Manager; therefore, what occurred (when the Assistant City Manager signed the discipline letter) was a technical violation of the Rules.

Following discussion, the Board entered a motion to GRANT the employee's Motion for Reversal of Disciplinary Action.

Under discussion, Attorney Rind stated that the City Manager retroactively signed off on disciplinary action that occurred in the past so if the City Charter says that the City Manager has to now consider the discipline and make a decision on whether there is discipline, she was not waiving the argument that this is now precluded, but then presumably it would be reversing this action in the future. She went on to say that what the City Manager did was approve backwards what was improperly done, which she thinks makes a difference.

ACA Vizcaino stated that as an Officer of the Court, she would proffer that the decision to discipline Mr. Alexander in 2008 was a joint decision made by the City Manager and Assistant City Manager. She went on to say that the Assistant City Manager did sign the disciplinary letter and the department concedes that the appropriate person to sign was either the department director or City Manager under which the employee was being supervised. ACA Vizcaino further stated that corrective measures were taken and the appropriate person signed the suspension letter.

Chairman de la O asked if the letter signed by the Assistant City Manager [in 2008] was rescinded.

ACA Vizcaino responded in the negative.

Chairman de la O asked if a letter was issued by the City Manager and another letter issued by the Assistant City Manager.

ACA Vizcaino responded in the negative. She went on to say that an amended suspension letter [was signed by the City Manager].

Chairman de la O stated that the reason he asked the question [about whether the 2008 letter was rescinded] was because he did not know how to characterize the letter [signed by the City Manager] since he had not seen it.

Cynthia A. Everett, Special Counsel to the Board, stated that the question the Chairman asked [concerning the disciplinary letter] she thinks was really the issue because in the best light, there appeared to be two disciplinary actions and the Motion was not clear as to what disciplinary action the Board would be addressing through its motion. She went on to say that there are no facts before the Board, but argument by counselors and that she heard a proffer, but again there were no actual facts for which the Board could make a decision. Special Counsel Everett further stated that there was discussion about a summary judgment, but the Motion did not set out any undisputed facts for which this Board is to make this type of ruling. She stated that unless the motion was clarified, there is now a disciplinary action letter dated June 26, 2009 by the City Manager, which all sides would have to concede would be appropriate, but then there are allegations of what the City Manager did and his intent; however, a determination cannot be made based upon a proffer from either counselor. Special Counsel Everett further stated that it would be inappropriate for the Board to address the disciplinary action dated June 26, 2009 through this process because consistent with the Civil Service Rules, Mr. Alexander had not asserted an appeal of this action so she would ask that the Board keep this in mind. She went on to say that from what she can see, there are two separate disciplinary actions; however, if the department wished to clarify this issue, she suggests it be put on paper.

Member Angel-Capo asked if the disciplinary letter dated June 26, 2009 is a separate issue from the discipline issued to Mr. Alexander in 2008.

ACA Vizcaino responded that it was the same letter signed by the City Manager and the intent was not to issue Mr. Alexander an additional 5-day suspension for the same incident.

Chairman de la O stated that he wants to make sure the Board did not miss Special Counsel Everett's point so he would refer to the 2009 letter as the superseding discipline. He went on to say that this action was not before the Board because it was just delivered yesterday and the employee had not appealed the disciplinary action. Chairman de la O further stated that if Member Cruz' motion was to grant the Motion for Reversal of Disciplinary Action as to the 2008 discipline that is before the Board, it was essentially moot because the department was no longer posing that discipline. He reiterated that a motion cannot be made regarding the 2009 discipline [signed by the City Manager] because it was not before the Board.

Member Scarola stated that if Attorney Rind had argued this case today without giving the City proper notice, she would have won her case (based on the fact that the discipline was improperly delivered) and the case would have been closed. He went on to say that the department realized that it had made an error so in order to correct the matter, the 2008 discipline should be rescinded, Mr. Alexander's 40 hours without pay restored, and if the department wished to discipline Mr. Alexander moving forward, this would be appropriate.

Member Angel-Capo stated that the department's attorney represented that it was the

same discipline letter.

Chairman de la O stated that it was the same discipline letter with the date scratched out and an additional signature (of the City Manager) added to the letter.

Member Scarola asked if Mr. Alexander would have to serve the 5-day suspension again because there was nothing in the letter to say that he had already served the suspension.

Chairman de la O responded that the City represented that it was not going to have Mr. Alexander serve another 5-day suspension.

Member Scarola stated that was what the department's attorney represented, but not what the letter represented.

Chairman de la O stated that this could be a subject of an appeal, but Mr. Alexander had not appealed the 2009 discipline because he just received it. He went on to say that there might be all sorts of arguments Mr. Alexander can raise in the future, but the discipline was not before the Board.

Member Cruz stated that the department made a mistake and now wants to correct it.

Chairman de la O stated that Member Cruz may be right (that the department made a mistake and now wants to correct it) but whether that is correct under the Charter, the Board does not know yet. He went on to say that the Board would have to give everyone a chance to come up with their arguments so that the Board knows whether or not it is correct. Chairman de la O stated that all the Board had before it, if it had anything, was the 2009 disciplinary letter, which was the reason he asked the department's attorney if the 2008 letter was rescinded. He stated that if the 2008 letter was rescinded by the superseding discipline, then the employee's Motion would be moot [and Mr. Alexander would have to appeal the superseding discipline for relief].

ACA Vizcaino asked for a short recess so that she could put on the record the presentation [of whether the 2008 discipline letter was rescinded].

Member Scarola asked the Executive Secretary if she recalled a case that came before the Board about three years ago wherein an employee in the Office of Neighborhood Enforcement Team (NET) received discipline by someone who did not hold the position of department director.

The Executive Secretary stated that she did not recall such a case and she was not saying that it did not happen, but it still would be up to the department director to decide whether to issue discipline.

Chairman de la O stated that a department director could still issue the same discipline if the inappropriate person originally administered the discipline, and in that case that Member Scarola referenced, the department director may have chosen not to issue discipline. He went on to say that the Board would return to this item after the recess.

Following the recess, the Board continued discussion of Mr. Alexander's Motion for Summary Reversal of Disciplinary Action.

ACA Vizcaino stated that the Board wanted clarification as to whether the March 20, 2008 original discipline issued to Mr. Alexander would be rescinded and the answer to

this question was in the negative. She went on to say that she would proffer what she argued earlier today, which was the superseded discipline (dated June 26, 2009) that includes the City Manager's signature was an amended version of the 2008 letter with the same set of facts, allegations, and cited rule violations.

Chairman de la O stated that if that is the case, the department's position would be that even as a corrected/amended letter, it has been appealed and it is properly before this Board. He went on to say that there is one discipline before the Board which was originally dated March 20, 2008, but has changed to the date of June 26, 2009. Chairman de la O asked Attorney Rind for her position.

Attorney Rind responded that their position is that the 2008 letter signed and served on Mr. Alexander violated the City Charter and that it was inappropriate for the City Manager to sign a discipline letter without giving the employee proper notice.

ACA Vizcaino stated that the letter was in absolute compliance with the City Charter and the Board's Civil Service Rules and Regulations which allows discipline letters to be signed by the City Manager or department director for which the employee works, and in this case the letter was signed by the City Manager who is one of the persons authorized under the Rules to issue discipline.

Chairman de la O stated that he was not comfortable making a decision that the City Manager violated the Charter without some case law indicating such. He went on to say that this was a policy argument but he had not seen any case law or any provisions of the Charter or the Civil Service Rules to say that the department could not amend discipline after it was issued. Chairman de la O further stated that he was not prejudging, but he was not going to agree that the department violated the Charter and that he was not going to grant the Motion for Summary Reversal of Disciplinary Action filed by the employee unless he had some case law that said otherwise.

Attorney Rind stated that the Rules require that the employee be given notice within 5 days of serving the discipline; however, service has been beyond the 5 days.

Chairman de la O asked Attorney Rind if she was saying that the employee needed to be served notice within 5 days.

Attorney Rind responded in the affirmative.

Chairman de la O stated that essentially the City would argue that this was the relation back doctrine, which is amending what was already done for statute of limitation or any other purpose.

Attorney Rind stated that at the time of the discipline being served, her client was served with essentially a non-discipline and he has now been served with an amended discipline in 2009. She went on to say that she understands what the Chairman was saying about the relation back doctrine but she was not sure if it fit in this set of facts.

Chairman de la O stated that he thinks it would be very troubling if there was a deadline like the police department has because then the department would not be able to argue the relation back doctrine and fix it. He went on to say that the department took the position that there is no deadline so this would be one of the things the Board needs to address. Chairman de la O asked Attorney Rind if she was willing to withdraw her motion, do some legal research, and come back to the Board with her findings.

Attorney Rind responded in the negative.

Chairman de la O reiterated that he would not vote for this argument because whether or not the department could amend discipline was something the Board needed to address, but he did not know if the Board had enough case law to make that determination.

Member Angel-Capo stated that the disciplinary letter was revised by the City Manager with a new date because the department realized at the last minute that the letter was issued with the incorrect signature.

Member Dames stated that the Assistant City Manager meted out discipline to an employee when he did not have the authority to do so in accordance with the Rules.

Chairman de la O stated that the question is whether the department can amend discipline that was issued and that he does not think the Board should grant the employee's motion because the Board needs to find out whether it can be done.

Following discussion, the Board entered a motion to GRANT the employee's Motion for Summary Reversal of Disciplinary Action 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 and Member Cruz

No: Chairperson de la O and Chief Examiner Scarola

F. REPORTS

F.1 09-00002 Pending Hearings as of June 30, 2009. (NOTIFICATION)

G. REQUESTS FOR HEARINGS

G.1 09-00545 Copy of a Request for a Grievance Hearing from Ajit S. Chhabra, Budget Analyst, pursuant to Civil Service Rule 16.2 - Complaint by Employee, concerning an alleged violation of Civil Service Rule 17.1 - Practices, Penalties. (DISCUSSION)

Deferred from the meeting of June 2, 2009.

Attorney Guttman-Valdes asked that this item be continued because she would be amending the request.

ACA Vizcaino stated that she had no objection to the employee's request.

Attorney Guttman-Valdes asked if her client's request could be placed on the July 14, 2009 agenda.

The Executive Secretary responded that would depend on how soon her office received a copy of the amended request.

Attorney Guttman-Valdes responded that she would have the document ready by next week.

No other discussion took place on this item.

DEFERRED BY BOARD: TENTATIVELY SCHEDULED FOR DISCUSSION AT JULY 14, 2009 MEETING.

H. TODAY'S HEARINGS

- H.1 09-00004** Hearing of appeal on behalf of Rodrigo Jimenez, Telecommunications Technician, concerning his demotion.
Hearing previously scheduled for May 12, 2009; however continued pending settlement. Hearing scheduled for today, pursuant to Civil Service Board Manual of Procedures.
- ACA Vizcaino stated that she was not going forward with this case today because a proposed settlement agreement was drafted and given to opposing counsel this morning for review.*
- Chairman de la O asked if the matter needed to be postponed again.*
- ACA Vizcaino responded in the affirmative.*
- No other discussion took place on this matter.*
- NO ACTION TAKEN : AWAITING COPY OF SETTLEMENT TO REMOVE FROM THE BOARD'S DOCKET AND CLOSE THE FILE.**
- H.2 08-00366** Hearing of appeal on behalf of Ryan Alexander, Building Inspector III, relative to his 5-day suspension, effective March 21, 2008.
- No action required by the Board on this case. (See Agenda Item E.4 - Motion for Summary Reversal of Disciplinary Action filed on behalf of Ryan Alexander.)*
- DISCUSSED : APPROVED MOTION to grant the employee's Motion for Summary Reversal of Disciplinary Action. Case will be closed and removed from the Board's docket.**
- H.3 08-01324** Hearing of appeal on behalf of Terry Pagan, Stable Attendant Supervisor, relative to her 8-hour suspension, effective November 10, 2008.
- WITHDRAWN BY THE EMPLOYEE; NO ACTION REQUIRED BY THE BOARD. CASE WILL BE CLOSED AND REMOVED FROM BOARD'S DOCKET.**
- H.4 08-01413** Hearing of appeal on behalf of Tika Jones, Police Officer, concerning a 10-hour suspension, effective November 23, 2008.
- The Executive Secretary stated that Officer Jones requested a CONTINUANCE of this case and also her second case that is listed under Item H.5.*
- ACA Vizcaino stated that she had no objection to the continuance requests.*
- Chairman de la O asked if this was the first time Officer Jones' hearings were scheduled.*
- The Executive Secretary responded in the affirmative.*
- Following discussion, the Board entered a motion to CONTINUE the appeal hearing and charge the continuance to the employee, which resulted as follows:*
- Motion by Chief Examiner Scarola, seconded by Member Angel-Capo, 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.5 09-00749 Hearing of appeal on behalf of Tika Jones, Police Officer, concerning a 20-hour suspension, effective January 6, 2009.

CONTINUED AT THE REQUEST OF THE EMPLOYEE. (See Item H.4 for details)

H.6 08-01415

Hearing of appeal on behalf of Juan Herrera, Police Officer, of a 20-hour suspension, effective November 24, 2008.

ACA Vizcaino stated that she and Attorney Rind agreed to a joint continuance based upon a pending agreement. She went on to say that Officer Herrera currently has three pending Civil Service cases consisting of 10, 20, and 40 hour suspensions and that it is her understanding that once the penalties are corrected and the settlement finalized, Officer Herrera will withdraw his appeal request.

Chairman de la O stated that the Board will continue Officer Herrera's hearing until the appeal is withdrawn.

Following discussion, the Board entered a motion to approve a JOINT CONTINUANCE of Officer Herrera's hearing, which resulted as follows:

Motion by Chief Examiner Scarola, seconded by Chairperson de la O, 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

ADJOURNMENT:

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

Motion by Member Cruz, 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

The meeting adjourned at 12:03 p.m. A break was taken at 11:20 A.M.

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary