

City of Miami

*City Hall
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Meeting Minutes

Tuesday, September 22, 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 10:20 a.m. The roll call for the 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 August 25, 2009.

The Board entered a motion to APPROVE the minutes of the regular meeting of August 25, 2009 which resulted as follows:

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

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

B. PERSONNEL MATTERS

- B.1** Notification of a memorandum from David A. Rosemond, Director, Office of the NET Administration, notifying Michelle G. Bramwell, Administrative Assistant II, of her return to former classification (approved by Hector Mirabile, Director of Employee Relations). Michelle G. Bramwell is being rolled back to Fiscal Assistant.

NOTIFIED

- B.2** Copy of a memorandum from Adam L. Burden, Assistant Chief, Department of Police, requesting an extension of probationary period of Earnest Lawrence, Police Officer, for three (3) additional months beyond September 24, 2009. (DISCUSSION)

Chairman de la O asked Officer Lawrence if he was aware the department was seeking to extend his probationary period.

Earnest Lawrence, Police Officer, responded in the affirmative.

Chairman de la O asked Officer Lawrence if he had any objections to the department's request to extend his probationary period.

Officer Lawrence stated that he had no objections; however, he did have some questions with regards to his probationary period since he was misinformed about the process for probationary police officers. He went on to say that in order for a police officer to become permanent, he must complete the academy, become certified by the State, and complete the Field Training Officer (FTO) Program which consists of a 6-month pre-FTO and 6-month post-FTO training. Officer Lawrence further stated that he completed the FTO Program; however, he was out for two months due to an injury and when he returned to duty, he worked 3 months at the Front Desk [which is located in the lobby of the Police Department]. He stated that at the time he was assigned to the Front Desk, he was evaluated; however, at the end of the 3 months he was told the time did not count [towards his probationary period] because he was on light duty status at that time. Officer Lawrence went on to say that he read the Civil Service Rules with regards to layoffs, and they mentioned the order of layoffs would be temporary

employees first, followed by probationary and lastly permanent employee; therefore, his other concern was that given his status as a probationary officer, although he had not received a pink slip, there was a possibility that he still could be laid off.

Chairman de la O stated that he did not know the answer, but he assumed the police union could answer his question.

Member Scarola asked that the Police Department's representative respond to Officer Lawrence's question.

Jorge Valladares, Police Personnel Coordinator, provided the Board with a detailed overview of the process probationary officers must complete in order to attain permanent status and an injury that Officer Lawrence sustained that prohibited him from performing as a full-duty officer which was the basis for the department's decision to request an extension of his probationary period.

Chairman de la O stated that Officer Lawrence's question was whether or not the City's layoff would affect him as a probationary officer.

Mr. Valladares responded that as a probationary officer, Officer Lawrence could be affected by the layoff. He went on to say that if the department's request to extend Officer Lawrence's probationary period is not granted by the Board, he would be made permanent, effective Friday; however, this action would be establishing a precedent. Mr. Valladares further stated that the reason the (Civil Service) rule was changed (regarding the length of time for probationary officers) was because during the probationary period, officers would get injured and upon returning to duty they would be assigned to the Front Desk, but made permanent without completing the field duty work. He stated that if the department makes Officer Lawrence permanent now and give him credit for the time he was disabled and on light duty status, the department would be establishing a precedent.

Member Scarola stated that he was a part of the board [in the Police Department] that changed the rule for probationary officers. He went on to say that at that time, the board built in a 6-month safety net in the event of pregnancy, injury, sickness, etc., but it seemed in Officer Lawrence's case, for whatever reason it took up the additional 6 months that he technically would have been released had he not been injured. Member Scarola further stated that Officer Lawrence is now at the 24-month period that his probationary period needs to be extended to complete the 6-month post-FTO training for which he has to ride solo.

Chairman de la O asked Mr. Valladares if the reason the department requested a 3-month extension of Officer Lawrence's probationary period was because he needed to complete 3 months of FTO training.

Mr. Valladares responded that Officer Lawrence only needs to complete one month of FTO training, but the department asked for a three month extension in the event of injury, illness, etc. (which would alleviate the department from having to request subsequent extensions).

Member Scarola asked if the Board were to grant the department's request for a 3-month extension and Officer Lawrence successfully completed the post FTO training at the end of one month, would the department make him permanent at that time.

Mr. Valladares responded in the affirmative. He went on to say that such language was indicated in the memo to the Executive Secretary which stated that should Officer Lawrence comply with all training requirements before the end of the extension,

consideration shall be afforded at that particular time taking into account training requirements, personal conduct, and disciplinary profile, a recommendation to grant permanent status shall then be issued.

Member Scarola stated that if Officer Lawrence has no issues, he would be granted permanent status at the end of the month; however, Officer Lawrence's question was in regards to the layoff order and he could understand his concern since there are no temporary police officers, which would then mean that the layoffs would begin with probationary and subsequently permanent police officers.

Mr. Valladares stated that if the Board grants the extension request, Officer Lawrence's status would be probationary, which would mean that he could be affected by the layoff. He went on to say that if the request is denied, Officer Lawrence would become permanent in two days even though he would not have complied with the contractual requirements.

Member Scarola stated that his only concern is that with probationary officers, they can be released from their jobs tomorrow and once they become permanent, they would be laid off according to some type of ranking order. He went on to say that he could be wrong, but he believed that probationary officers were also being laid off according to a ranking order. Member Scarola asked if there were still probationary officers working who have yet to receive a layoff letter.

Mr. Valladares stated it was understanding that there were 148 probationary employees in the department [which comprises] 122 police officers, 15 police recruits, 10 Detention Officers, and 1 police officer trainee, but he did not think 148 letters were issued.

Member Scarola stated that to date 126 letters were issued.

Following discussion, the Board entered a motion to DENY the department's request to extend Officer Earnest Lawrence's probationary period three (3) additional months beyond September 24, 2009, which resulted as follows:

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

Aye: Dames, Angel-Capo and Cruz

No: Scarola and Chairperson de la O

C. MILITARY LEAVES OF ABSENCE

D. DISCIPLINARY MATTERS

- D.1** Copy of a Report from the City Manager concurring with the Board's recommendations 1-3 and rejecting 4-5, concerning the Investigation hearing of Amelia Pritchard, Administrative Assistant I, Department of Fire Rescue.
(NOTIFICATION)

NOTIFIED

- D.2 Copy of a Report from the City Manager concurring with the Board's determination in finding no violation of Civil Service Rule 14.6 and making no recommendation concerning the Investigation hearing of Victor Cornier, Materials Specialist, General Services Administration. (NOTIFICATION)

NOTIFIED

- D.3 Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Roger Jackson, Police Officer, of his 20-hour suspension, effective September 11, 2009. (NOTIFICATION)

NOTIFIED

- D.4 Copy of a letter from Kelly Barkett, Jr., Director, Department of General Services Administration, notifying Manuel Lucena, Heavy Equipment Mechanic, of his 5-day suspension, effective August 20, 2009 and a copy of a request to appeal from Manuel Lucena. A hearing will be scheduled in accordance with the Civil Service Rules and Regulations. (NOTIFICATION)

RECEIVED AND FILED

- D.5 Copy of a letter from Mario E. Soldevilla, Director, Department of Solid Waste, notifying Vincent James, Heavy Equipment Specialist, of his 3-day suspension, effective September 11, 2009. (NOTIFICATION)

NOTIFIED

- D.6 Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Stanley Jean-Poix, Police Officer, of his 10-hour suspension, effective September 10, 2009. (NOTIFICATION)

NOTIFIED

- D.7 Copy of a letter from John F. Timoney, Director, Department of Police, notifying Wayne Cooper, Police Officer, of his 10-hour suspension, effective September 18, 2009. (NOTIFICATION)

NOTIFIED

E. GENERAL ITEMS

- E.1 Copy of Findings of Fact concerning the appeal hearing of Silvia Benitez, Communications Operator, relative to her 80-hour suspension, effective February 9, 2009. (DISCUSSION)

Chairman de la O asked if the department's attorney reviewed the proposed findings of fact.

Barnaby Min, Assistant City Attorney (ACA), responded that he reviewed the findings and submitted his comments to Special Counsel Everett, which included one correction which was already made; therefore, he had no objections to the findings of fact.

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

Teri Guttman-Valdes, Attorney at Law, responded in the affirmative and referred the Board to page 2, second paragraph, first sentence and asked that it be amended to read, "As a result of the foregoing, Appellant was CHARGED WITH VIOLATING the following rules:" [NOTE: Wording in ALL CAPS indicate proposed language to be added or stricken].

Cynthia A. Everett, Special Counsel to the Board, stated that for clarification purposes, the information included under the Findings of Fact and Conclusion of Law section of her report is not to imply that the Board made the findings but the department.

Chairman de la O asked for the department's position on amending the findings as requested by Attorney Guttman-Valdes.

ACA Min stated that he read that paragraph as information that was cut and pasted from the charging document.

Without objection from other Board Members, Chairman de la O stated that since the department had no objection, the change would be made so that the findings were clear. He asked the attorney if she had any other objections.

Attorney Guttman-Valdes referred the Board to page 4, and stated that she wished to add the following sentence at the end of finding #5 so that it reads, "Appellant then asked Supervisor Navarro why Ms. Garcia had to give up her chair. DUE TO PRIOR ISSUES REGARDING CHAIRS, IT HAD BEEN DETERMINED THAT CHAIRS WOULD BE DISTRIBUTED ON A FIRST COME, FIRST SERVED BASIS."

Chairman de la O asked for the department's position on Attorney Guttman-Valdes' request to amend finding #5.

ACA Min responded that he had no objection.

Without objection from other Board Members, Chairman de la O stated that since the department had no objection, the sentence would be added to end of finding #5 as requested by the employee.

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

E.2

Copy of Findings of Fact concerning the appeal hearing of Teresa Borkowski, Police Sergeant, relative to her 10-hour suspension, effective May 24, 2006. (DISCUSSION)
Deferred from the meeting of August 25, 2009.

Chairman de la O stated that he was informed that Items E.2 and E.3 which pertain to the Findings of Fact concerning the appeal hearings of Sgt. Teresa Borkowski would be carried over to the Board's next meeting.

DEFERRED TO THE NEXT MEETING FOR CONSIDERATION BY THE BOARD.

- E.3 Copy of Findings of Fact concerning the appeal hearing of Teresa Borkowski, Police Sergeant, relative to her 10-hour suspension, effective April 4, 2006. (DISCUSSION)

DEFERRED TO THE NEXT MEETING FOR CONSIDERATION BY THE BOARD.

- E.4 Notice of a Request to Continue from Osnat K. Rind, Attorney, on behalf of Juan Herrera, Police Officer, relative to his 10-hour suspension, effective November 23, 2008. (DISCUSSION)

Hearing of appeal is scheduled for today (Item H.2).

The Executive Secretary informed the Board that Attorney Rind would not be present today and that she requested a continuance.

ACA Min stated that he believed the basis for Attorney Rind's motion for a continuance was that she had other matters she was working on that prevented her from attending today's meeting.

Chairman de la O stated that since Attorney Rind will not be present, he would suggest that the Board make one motion to continue the appeal hearings of Officer Juan Herrera (Item E.4), Officer Marc Marcelin (Item E.5), and Officer Favian Rodriguez (Item E.6).

Following discussion, the Board entered a motion to approve Attorney Rind's request for a CONTINUANCE of the appeal hearings on behalf of Police Officers Juan Herrera, Marc Marcelin, and Favian which resulted as follows:

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

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

- E.5 Notice of a Request to Continue from Osnat K. Rind, Attorney on behalf of Marc Marcelin, Police Officer, relative to his 20-hour suspension, effective February 9, 2009. (DISCUSSION)

Hearing of appeal is scheduled for today (Item H.3).

Motion by Chief Examiner Scarola, seconded by Member Cruz, that this matter be APPROVED : THE BOARD APPROVED THE EMPLOYEE'S REQUEST FOR A CONTINUANCE. (See Item E.4 for Board discussion relating to this matter.) PASSED by the following vote.

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

- E.6 Notice of a Request to Continue from Osnat K. Rind, Attorney, on behalf of Favian Rodriguez, Police Officer, relative to his 40-hour suspension, effective January 3, 2009. (DISCUSSION)

Hearing of appeal is scheduled for today (Item H.4).

Motion by Chief Examiner Scarola, seconded by Member Cruz, that this matter be **APPROVED : THE BOARD APPROVED THE EMPLOYEE'S REQUEST FOR A CONTINUANCE.** (See Item E.4 for Board discussion relating to this matter.) **PASSED** by the following vote.

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

F. REPORTS

F.1 Pending Hearings as of September 22, 2009. (NOTIFICATION)

G. REQUESTS FOR HEARINGS

G.1 Copy of a Request for Grievance Hearing from Suzann E. Nicholson, Customer Service Representative III, pursuant to Civil Service Rule 16.2, concerning an alleged violation of Section 36(d) of the City of Miami Charter - Rules; examinations; eligible list; certification of vacancies, and Civil Service Rules 6.3 - Content of Examinations, and 6.5 - Method of Rating. (DISCUSSION)
2nd Request for Grievance Hearing see minutes of 6/2/09.

The Executive Secretary informed the Board that she had advised Ms. Nicholson of today's meeting and had made several attempts to contact her office to no avail.

ACA Min asked that Ms. Nicholson's request be denied since the Board reached out to her and she is not present.

Special Counsel Everett stated that Ms. Nicholson did call in and provided a reason as to why she was not present. She went on to say that she advised Ms. Nicholson that since the Board was in the midst of a hearing, her matter would be carried over to the next meeting.

DEFERRED TO THE BOARD'S NEXT MEETING.

H. TODAY'S HEARINGS

H.1 Hearing of appeal on behalf of Viona Browne-Williams, Police Officer, relative to her 80-hour suspension, effective April 5, 2007.

ACA Min stated that a settlement has been made in this case; however, the attorneys are still working out the language. He went on to say that once the language is agreed upon, the settlement would be submitted to the individual client; therefore, he would ask that this matter be continued over to the next meeting.

DISCUSSED : CASE WILL BE CLOSED UPON RECEIPT OF SETTLEMENT.

H.2 Grievance hearing on behalf of Edward Diez, Firefighter, pursuant to Civil Service Rules 5-Application for Examinations, 6-Examinations, 7-Eligible Registers and 8-Appointments, Promotions and Advancements.

The Board entered into the scheduled grievance hearing on behalf of Edward Diez, the Grievant.

Teri Guttman-Valdes, Attorney at Law, represented the Grievant.

Barnaby Min, Assistant City Attorney, represented the Department.

Opening statements were made by both attorneys.

Chairman de la O asked Attorney Guttman-Valdes to call her first witness.

Attorney Guttman-Valdes responded that she did not think she needed to call any witnesses since [she would be relying on her exhibits to prove her case] so in essence, her presentation would be likened to that of a request for summary judgment.

Chairman de la O asked the department's attorney if he wished to proceed the same as Attorney Guttman-Valdes or if he wished to call witnesses.

ACA Min responded that he would prefer to proceed with the motion to resolve the complaint based upon the documents by reserving the right to hear explanations from witnesses if necessary, but he did not know if this was allowed [in accordance with the Board's procedures as outlined in the Civil Service Rules.]

Chairman de la O stated that basically ACA Min is asking that both sides have arguments, but if they reach a factual dispute, each side reserves the right to call a witness as needed. He went on to say that he, personally, did not have a problem with ACA Min's suggestion, but he needed to know opposing counsel's position.

Attorney Guttman-Valdes stated that she had no problem with proceeding as suggested by ACA Min.

No witnesses were called by either side. Chairman de la O gave both sides an opportunity to go through their exhibits and provide argument as to whether or not they felt the Grievant should be promoted to the rank of Fire Lieutenant.

Both attorneys rested their case.

Edwin Diez, Grievant, was called as a rebuttal witness.

Questions were posed by Board Members Dames and Angel-Capo during the testimony of witness Edwin Diez.

Chairman de la O asked if there were any other questions by Board Members. Hearing none, the Chairman closed the hearing. He went on to say that there was no need for closing arguments since both attorneys had already provided closing argument through lengthy discussion in defense of their positions as to whether Edward Diez should be promoted to the rank of Fire Lieutenant.

Following closing argument by both attorneys, Chairman de la O stated that from his view, it was obvious that Mr. Diez did not have the four (4) years of continuous, satisfactory service and he did not think that could be disputed in any way. He went on to say that the question is whether the City or department's behavior should be deemed as Attorney Guttman-Valdes put it as "equitable estoppel" which means that the City acted in such a way that the Board should give the person "a pass" or that the City should have to stick with its original mistake and not be allowed to correct it. Chairman de la O further stated that was the reason why he asked Attorney Guttman-Valdes what was the Board trying to determine today; because if the Board was trying to determine Mr. Diez' eligibility, he was not eligible and there was no dispute about it. He stated that [the employee wants the Board to find that if] something had been revealed today through (argument or witness testimony) that clearly proved Mr. Diez was ineligible, the Board would have to ignore it because the City had said he was eligible, and to him that would be tougher (to agree with). He went on to say that everyone needs to remember

that it is not only Mr. Diez, but a lot of people behind him who will get impacted so the question is should other employees in the Fire Department become affected because someone in Employee Relations made a mistake or should Mr. Diez be affected due to the mistake. He further stated that the question is where does the Board decide to put the burden of that mistake because someone will be hurt by the Board's decision because someone in the City made a mistake. Chairman de la O stated that the question is how does the Board spread around the matter [of the mistake made by someone in Employee Relations] and in his opinion it is just a question of eligibility. He went on to say that Mr. Diez was not eligible, he obviously is smart and can do well on the next [Fire Lieutenant] exam. Chairman de la O further stated that he was sure [his response] was not what Mr. Diez wanted to hear, but at the end of the day, he does not know where the line is going to be drawn when the City makes a mistake. He stated that [this situation] almost becomes like the game of chess because if you take your hand off of the chess piece, the position that the employee is advocating is you cannot take it back and that is sort of hard when dealing with many other employees and eligibility when there are clear issues of eligibility, and Mr. Diez was not eligible.

Member Angel-Capo stated that she agreed with the Chairman's statements, but the only problem she had was that the official notices were issued to the Fire Department; however, the department did not realize Mr. Diez' name was included in the notice until after the test was administered. She went on to say that the City made a mistake by deeming him eligible to take the Fire Lieutenant exam. Member Angel-Capo further stated that if the Fire Department had caught the mistake the first time the notice was posted, she would not have had a problem letting Mr. Diez know that he was ineligible and he needed to wait for the next Fire Lieutenant exam, but that was not the case. She stated that she worked in the Fire Department and she used to put the notices out to those who had to read them so she is aware that the department took these notices seriously. She reiterated that she was having a problem [voting against Mr. Diez] because the department did not notice the mistake until after he took the exam.

Member Cruz stated that he did not know who would be affected by the decision made by the Board today, but he thought Mr. Diez' satisfactory evaluations neutralized the 240-hour suspension that he received four years ago.

Member Dames stated that he and Mr. Diez never worked together, but he looked like a nice kid. He went on to say that he believed Mr. Diez when he said he had no idea at the time he (applied that he) was ineligible, but he did not believe that Mr. Diez tried to beat the system. Member Dames further stated that he had a problem with the City's usage of a color-coded chart for depicting eligibility to take the Fire Lieutenant exam and because the chart was copied and submitted to the Fire Department, Mr. Diez slipped through the crack because all names on the copy were in black ink as opposed to another colored ink that would have differentiated the eligible from the ineligible candidates. He stated that Mr. Diez spent 8 months studying for the exam, ranked number 16 on the [eligible register], and then someone brought up the matter [that Mr. Diez should not have been allowed to take the exam because he was ineligible.] Member Dames went on to say that he was aware that Mr. Diez was ineligible, but when he asked about the safeguards used for the exam, he was told that names appearing in black ink was an indication of persons' eligibility to take the exam and names appearing in red ink was an indication of ineligibility, but the department ran out of ink. He further stated that the rationale provided by the department [as to why the mistake occurred] did not pass the nose test especially when dealing with persons' livelihoods. Member Dames stated that he concurred with the Chairman that according to the letter of the law, Mr. Diez was ineligible, but Mr. Diez was not aware that he was ineligible and it was apparent the City did not know either. He went on to say that Mr. Diez attained a high score because he studied hard. He stated that a few months ago he asked Mr. Diez if he took the (most recent) Fire Lieutenant exam and he replied that he did not [apply]

because he was not eligible. He stated that he does not want to punish Mr. Diez, but he took an oath [when he was appointed as a Board Member] and he is trying to [honor that oath]; but the color-coded system used by the City (for differentiating those who are eligible and those who are ineligible) just did not sit well with him.

Member Cruz stated that Mr. Diez was deemed eligible, and the City had the time to determine his eligibility. He went on to say that according to Mr. Diez' evaluations, they were satisfactory so maybe someone did not like him [and reported that he was ineligible.]

Chairman de la O stated that Special Counsel Everett reminded him that Mr. Diez requested a hearing pursuant to Civil Service Rules 16.1 and 16.2. He went on to say that Rule 16.1 has to do with an abuse of power and 16.2 has to do with [determining whether] a violation of a rule was committed by the City. Chairman de la O further stated that if the Board was going to find against the City, they needed to find whether there was an abuse of power or show a violation of a Civil Service Rule that the City engaged in.

The Executive Secretary stated that according to the complaint made pursuant to Rule 16.2, the Grievant alleged a violation of Rules 5, 6, 7, and 8 in their entirety, but during the discussion she only heard three (3) violations of Civil Service rules [Sections 5.4, 6.3, and 7.2] mentioned so she wanted to know if Attorney Guttman-Valdes revised her client's request .

Attorney Guttman-Valdes responded that she did not revise her client's request and that she just indicated specifically [Sections 5.4, 6.3, 7.2, and 7.5 of the Civil Service Rules].

Following discussion, the Board entered a motion to find that pursuant to Rule 16.1, the department engaged in an abuse power.

Under discussion, Member Cruz stated that he thinks there is someone in the Fire Department that does not like Mr. Diez.

Chairman de la O stated that in his opinion, there was zero evidence of any abuse of power. He went on to say that if all of the Board Members agree and he thinks most of them do, that Mr. Diez is ineligible then it would be hard for him to believe there was an abuse of power by someone recognizing [that he was ineligible to take the exam.] Chairman de la O further stated that there may have been motive that was other than selfless, but that is not necessarily an abuse of power when there was no evidence of who complained. He stated that the Employee Relations Department reviewed the complaint [against Mr. Diez] and he was found not eligible, but there was no evidence that Mr. Diez was a scapegoat as suggested by Member Cruz. Chairman de la O went on to say that the Board had no evidence of the underlying issue that got Mr. Diez the 240-hour suspension he received and no evidence as to what motivated someone to complain [about Mr. Diez' eligibility], but for it to be an abuse of power, it would have to be against someone like the Fire Chief or other superiors, but it cannot be an abuse of power by one of the people on the [certification] list for Fire Lieutenant because they do not have the power over Mr. Diez since they are his equal.

Member Dames posed a hypothetical question to the Board. He asked if the department would be entitled to take away Mr. Diez' Fire Lieutenant promotion if his ineligibility was discovered after he was promoted.

Chairman de la O responded that he did not know and asked ACA Min what his position was on when the eligibility determination is frozen.

ACA Min responded that Civil Service Rule 8.15 states, "Only employees qualified as set forth in the preceding subsections hereof and in the other pertinent sections of these Civil Service Rules and Regulations shall be eligible to hold such promotional positions"; therefore, if a person is not eligible that person cannot hold the position.

Member Dames asked again if the department could take away Mr. Diez' promotion had he been promoted.

ACA Min responded that Mr. Diez was not eligible; therefore he does not have the right to hold the position of Fire Lieutenant.

Chairman de la O stated that according to ACA Min's response, he was saying that the position could be taken away from Mr. Diez. He went on to say that he was thankful this issue was not before the Board.

Following discussion the motion on the floor to find that there was an abuse of power pursuant to a violation of Rule 16.1. The motion resulted as follows:

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

Aye: Cruz

No: Dames, Angel-Capo, Scarola and Chairperson de la O

The motion having failed, the Board entered a motion to find that there was no abuse of power as alleged by the Grievant, which resulted as follows:

Motion by Chief Examiner Scarola, seconded by Chairperson de la O, that this matter be APPROVED. PASSED by the following vote.

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

No: Cruz

Chairman de la O stated that the second issue was the Grievant's complaint made pursuant to Rule 16.2 that the Board needed to determine if there was a rule violation. He went on to say that there were two rules he felt the Board should focus on. Chairman de la O further stated that the first rule is Civil Service Rule 8.15, the last paragraph that ACA Min commented on which states, "Only employees qualified as set forth in the preceding subsections hereof and in the other pertinent sections of these Civil Service Rules and Regulations shall be eligible to hold such promotional positions." He stated that the last paragraph in Rule 8.15 answered the question as to what the Board is doing today and he did not see how the Board could find that someone was eligible who is not. Chairman de la O went on to say that Mr. Diez was not eligible so he cannot hold the position of Fire Lieutenant regardless of the City's mistakes. He further stated that he thought the Board's findings should point out that the City admitted that it messed up [by allowing Mr. Diez to sit for the exam.] He further stated that the Board also needed to consider Civil Service Rule 7.5 - Removal from Register, which states that someone's name can be removed from the register if there is cause otherwise in the Rules to remove their name from the register; therefore, the City had the right to remove Mr. Diez' name from the register because he was not eligible pursuant to the Civil Service Rules. Chairman de la O stated that he was not saying it is fair nor was he saying he felt good about [Mr. Diez' situation] especially after he could only imagine his disappointment after studying for 8 months and passing the exam. He went on to say that in some ways the disappointment would have been less if Mr. Diez had not passed the exam, but the rules are very clear as to what should happen [in this case.]

Member Cruz stated that Rule 7.5 talks about persons having to contact the department

director of Employee Relations if they wanted their name removed from a register or the department director being able to remove a persons names from a register if they could not be located by postal authorities within five days following the notification, but neither were the case in Mr. Diez' situation.

Chairman de la O responded that the last sentence in Rule 7.5 states, "Any cause specified in these rules for the rejection of applications may likewise be cause for the removal of the name of an eligible from the register on which it appears." He went on to say that Rule 7.5 indicates, "in these rules" and not "in this rule" so if Mr. Diez' application could have been rejected because he did not have 4 years of continuous, satisfactory service, then that is a basis for removing his name from the register.

Member Cruz stated that perhaps the Chairman was reading between the lines because he was not comprehending the same thing when reading Rule 7.5.

Chairman de la O stated that Rule 7.5 states that any cause within the rules for rejecting an application, which he thinks all of the Board Members not only agreed that his application not only could have been rejected but should have been rejected, then his name could be removed from the eligible register.

Member Cruz asked what cause was specified that would be the basis for rejecting Mr. Diez' application.

Chairman de la O responded that any cause specified in any of the rules as a reason for rejecting the application.

Member Dames stated that he realizes what the Chairman said about Mr. Diez being ineligible is correct, but he still was stuck on the fact that Mr. Diez studied 8 months for the Fire Lieutenant exam. He went on to say that unbeknownst to Mr. Diez, he slipped through the cracks because his name did not appear in red ink that would have alerted [administration] that he was ineligible and the reason this happened was because the City apparently ran out of colored ink. Member Dames further stated that when Mr. Diez passed the exam someone complained that he was not eligible to take the exam so he was penalized twice.

Member Angel-Capo stated that she was still stuck on the fact that the Fire Department did not catch that Mr. Diez was ineligible on the initial notice.

Following discussion, the Board entered a motion to find pursuant to Rule 16.2 that there was a violation of Rules 5.4 Disqualification, 6.2 Contents of Examination, 7.2 Order of Names on Registers and 7.5 Removal from Register.

Under discussion, Special Counsel Everett stated that it would be helpful to indicate how there was a violation under Rule 16.2 so that she could incorporate this information into the findings and if the Board had any recommendations she would incorporate them also.

Chairman de la O informed Board Members that they all needed to give Special Counsel Everett some guidance as to what rules were violated that make up Rule 16.2. He asked Member Cruz if he was adopting the reason set forth by Attorney Guttman-Valdes as to why Rule 16.2 was violated.

Member Cruz responded in the affirmative.

Following discussion the motion on the floor was amended to, the Board finds regarding the Rule 16.2 complaint filed by Fire Fighter Edward Diez that he be promoted to Fire

Lieutenant based upon the department's violation of Civil Service Rules 5.4 Disqualification, 6.2 Promotional Examinations, 7.2 Order of Names on Registers and 7.5 Removal from Register. The motion resulted as follows:

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

Aye: Dames, Angel-Capo and Cruz

No: Scarola and Chairperson de la O

Chairman de la O stated that he was trying to figure out if the Board needed to make specific recommendations to the City Manager or if it was self-executing in the sense that Mr. Diez' name would be placed back on the [eligibility] list. He went on to say that ACA Min mentioned that if Mr. Diez' name was to be replaced on the register, another lieutenant's name on the list would be removed.

Member Scarola stated that the Fire Lieutenant register has expired.

Special Counsel Everett stated that [in response to the Chairman's concern], the information would be forwarded to the City Manager so that he could determine whether there should be a remedy and if so, what type of remedy.

Chairman de la O asked Attorney Guttman-Valdes what type of recommendations did she wish the Board to make since it was her grievance.

Attorney Guttman-Valdes responded that she was more than happy to submit proposed recommendations on the Rule 16.2 complaint, but not the 16.1 complaint.

Chairman de la O stated that Member Dames had a specific recommendation he wished to have included in the Findings of Fact and Recommendation report that will be prepared by the Board's Special Counsel.

Member Dames stated that he felt Mr. Diez was harmed and he did not want to harm anyone else; therefore, he proposes that Mr. Diez be promoted and if in the future he gets promoted to a rank higher than Fire Lieutenant that the City would not be obligated to fill his Fire Lieutenant position once vacated.

No other discussion took place on the matter of Fire Fighter Edward Diez.

H.3 Hearing of appeal on behalf of Juan Herrera, Police Officer, relative to his 10-hour suspension, effective November 23, 2008.

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

H.4 Hearing of appeal on behalf of Marc Marcelin, Police Officer, relative to his 20-hour suspension, effective May 16, 2009.

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

H.5 Hearing of appeal on behalf of Favian Rodriguez, Police Officer, relative to his 40-hour suspension, effective January 3, 2009.

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

ADJOURNMENT:

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

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

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

**The meeting adjourned at 1:30 p.m. Breaks were taken 10:39-11:06 a.m. and
12:01-12:18 p.m.**

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary