

City of Miami

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

Tuesday, October 21, 2008

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 10:14 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

Member Dames left the meeting at 10:30 A.M. due to a personal commitment.

A. APPROVING THE MINUTES OF:

Regular Meeting of October 7, 2008.

The Board entered a motion to APPROVE the minutes of the October 7, 2008 meeting which resulted as follows:

Motion by Chief Examiner Scarola, seconded by Member Angel-Capo, to APPROVE. PASSED unanimously.

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

- D.1** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Margaret Fritz, Communications Assistant, of her 40-hour suspension, effective October 5, 2008. (NOTIFICATION)
- D.2** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Margaret Fritz, Communications Assistant, of her 80-hour suspension, effective October 19, 2008. (NOTIFICATION)
- D.3** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Jorge Hernandez, Police Officer, of his termination, effective August 18, 2008. (NOTIFICATION)
- D.4** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Geovani Nunez, Police Officer, of his termination, effective August 18, 2008. (NOTIFICATION)

E. GENERAL ITEMS**F. REPORTS**

- F.1** Pending Hearings as of October 21, 2008. (NOTIFICATION)

G. REQUESTS FOR HEARINGS

- G.1** Request for hearing from Mark Terry, Esq., pursuant to Civil Service Rule 14.1(b), concerning charges brought forth against Favian Rodriguez, Police Officer. (DISCUSSION)
Tabled from the meeting of October 7, 2008.
Chairman de la O stated that Mr. Terry's item is postponed since he will not be in attendance at today's meeting. The Executive Secretary informed the Board that she received a letter from Mr. Terry asking that his request be postponed to the Board's next meeting.
- TABLED ---Per the Chairman's instructions, Item Rescheduled to the November 4, 2008 meeting for Board consideration.**

H. TODAY'S HEARINGS

- H.1** Hearing of appeal on behalf of Larry Walker, Heavy Equipment Operator, relative to his termination, effective November 26, 2007.
Chairman de la O asked both attorneys if they were ready to proceed with the case of Larry Walker.
Assistant City Attorney Vizcaino and Attorney Irizarri responded in the affirmative.
Chairman de la O asked how long the Board had use of the Commission Chambers. The Executive Secretary responded that the room is available up until 5:00 p.m., however, one of the Board Members had to leave at 12 noon.
Chairman de la O stated that being the case, the Board can proceed with the cases in the absence of Member Dames. Chairman de la O asked if there was any reason why the Board could not proceed with the hearings today. The Executive Secretary responded in the negative.
Chairman de la O asked both attorneys for their number of witnesses who would be testifying. Assistant City Attorney Vizcaino responded that she had five witnesses and Attorney Irizarri responded that he had one witness.
Following discussion, the Board entered into the scheduled hearing of Larry Walker.
Diana Vizcaino, Assistant City Attorney, represented the Department.
Ramon Irizarri, Attorney at Law, represented the Appellant.
The Rule of Witnesses was invoked and Chairman de la O instructed potential witnesses to exit the room and someone from the office staff would guide them to a waiting area. He instructed witnesses not to listen to the hearing that is being broadcasted and not to speak to each other about their testimony either before or after they have testified.
Attorney Irizarri presented a procedural question that he had with regards to the reprimand that has some writing on it. He went on to say that he does not know who wrote the language on the reprimand and whether it is a part of the disciplinary process.
Chairman de la O responded that whenever the department introduces the document,

the Board would [determine] if the writing should be disregarded or not.

Opening Statements were made by Attorney Irizarri and Assistant City Attorney Vizcaino waived opening statements. During opening statements, Attorney Irizarri moved for a Motion to Dismiss the charges brought against his client on the basis that Mr. Walker's constitutional rights were violated, the department failed to follow Civil Service Rule 14.1 and that the Board did not have jurisdiction to interpret or enforce the Collective Bargaining Agreement.

Chairman de la O denied Attorney Irizarri's motion and provided a detailed summation in support of his decision.

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

1. John Babos, Light Fleet Superintendent, City of Miami, Department of General Services Administration.

Questions were posed by Chairman de la O during the testimony of witness John Babos.

2. Victor Morales, Fleet Manager, City of Miami, Department of General Services Administration.

3. Maria Barrero, Jury Administrator, U.S. District Court.

During the testimony of witness Maria Barrero, Attorney Irizarri stipulated that Mr. Walker neither served on a jury nor did he assert that he served on jury duty.

4. Jose Davila, Superintendent, Heavy Fleet, City of Miami, Department of General Services Administration.

5. Kelly Barket, Director, City of Miami, Department of General Services Administration.

Questions were posed by Board Members Scarola and Cruz during the testimony of witness Kelly Barket.

The Department rested its case.

Witnesses for the Appellant appeared in the following order:

Larry D. Walker, Jr., Heavy Equipment Operator, testified on his own behalf.

Questions were posed by Members Scarola and Cruz during the testimony of witness Larry D. Walker, Jr.

The Appellant rested his case.

Following closing arguments by both attorneys, Chairman de la O stated that the (Cleveland Board of Education v.) Loudermill case that Attorney Irizarri referenced during opening statements indicated that an employee must be given an opportunity to respond. He went on to say that the case law also said however, that the more due process that is given post-termination the less the opportunity to respond prior to termination needs to be. He went on to say that what happened in the Loudermill case which was upheld by the court was very similar to what happened in Mr. Walker's case, in that the employee was sat down, told that he was going to be terminated, and asked

for his side of the story. Chairman de la O further stated that the court said that because of the Loudermill case there was a hearing similar to Mr. Walker's case, which meant there was a post-termination appeal process where witnesses were called and cross-examined, which was fine. He stated that the court said that tenured public employees are entitled to oral or written notice of the charges against them, an explanation of employer's evidence, and an opportunity to present his/her side of the story. Chairman de la O went on to say that the court also said that the greater the post-termination remedies the less the Board needs to provide; therefore, he does not see that there was a violation in this case because Mr. Walker was sat down and asked about the jury duty, and he chose not to respond.

Chairman de la O stated that pursuant to Civil Service Rule 14.1, it is not the City's obligation to specifically tell Mr. Walker that he has a right to respond to the termination letter within five days and the reason the City does not have an obligation to do this is (1) it is cited in Rule 14.1 and (2) because Mr. Walker does not waive any rights that he has if he does not respond to the letter. He went on to say that the reason the letter must say that Mr. Walker has 15 days to appeal is because if he does not file within that time, he does in fact waive significant appellant rights so if he wanted to respond, he could have read the rules just as anyone could read them, but he was not harmed by not doing that. Chairman de la O further stated that Mr. Walker's real harm came when the Fleet Manager asked him, what was up with the jury duty incident and he did not respond nor did he give the explanation that he gave the Board today. He went on to say that it is hard for him to believe that Mr. Walker was sitting in the same room with Mr. Babos, the man who Mr. Walker implied in so many words who told him to stay home during the jury duty process, and when he is told he is going to be fired because of this action, he does not say a word. Chairman de la O further stated that it is very hard for him to accept that Mr. Walker was sitting with the person who he said misled him, who he said has been his friend for 10 years, and he did not say a word. He stated that Mr. Walker's response (to administration) should have been it was Mr. Babos who told him to stay at home, but he just sat there quietly which is hard for him to believe.

Chairman de la O stated that at the end of the day Attorney Irizarri is correct that there is conflict in the testimony, but all of the witnesses for the department were consistent in their testimony as to what occurred and what they were told by Mr. Walker and the only conflict comes is that Mr. Walker contradicted every one of the witnesses' testimony. He went on to say that none of the Board Members have personal knowledge of what happened because they weren't there, but the witnesses all seemed credible, they were consistent as to what they were told, and he weighed that against the reasonableness of Mr. Walker's behavior which is Mr. Walker was not at jury duty, but sitting at home while everyone else was at their jobs working. Chairman de la O further stated that Attorney Irizarri argued that it was not fair that no one knew the process for jury duty leave so how was his client to know what procedures to follow. He went on to say that his response to Attorney Irizarri's question would be to suggest the application of the "Golden Rule", which is if this was Mr. Walker's business, would he have wanted his employees to be sitting at home when they were called to jury duty and they are not at jury duty and not to mention Mr. Walker is paying the employees. Chairman de la O further stated that Mr. Walker knows the answer to his question which is, he would want his employees to be working if they were not going to be in the jury box. He stated that Attorney Irizarri made the argument that the Leave Request form does not say, "Call for Jury Duty" it says "Jury Duty" and the best analogy he can come up with for this is the military and the national guard because all of those people (reservists) are on call. Chairman de la O went on to say that those people (reservists) can be called at any time to actual military duty, but they do not get to stay home and not go to work because they might be called to Iraq, but it is when they are actually called do they take a leave. He further stated that it is not a reasonable interpretation for an employee to sit home and say that his summons indicates to call every day and that he could be called at any time

so they are not going to work.

Chairman de la O stated that Civil Service Rule 14.2(p) talks about a time record. He went on to say that the department's request for leave form does not define exactly what a time record is, but it does appear to be a form of a time record because it shows that Mr. Walker was out on leave for 10 days, Mr. Walker filled out the form and stated that he was on jury duty. Chairman de la O further stated that the reasonable interpretation of the form is that Mr. Walker was sitting on a jury. He stated that he does not have to accept Mr. Jardine's (written) testimony, but it was sort of the cherry on the cake because Mr. Jardine wrote that Mr. Walker told him that the person was found guilty, which gave everybody the impression that Mr. Walker sat on the jury. Chairman de la O went on to say that a lot of people would have to be lying to somehow get even with Mr. Walker, but he does not know exactly why they would do that. He further stated that he has no reason to disregard all of the testimony from the department, of which there is a lot, which he has to weigh against Mr. Walker's word and at the end of the day, he thinks the department met its burden.

Member Scarola stated that he thinks Sections 33.1 and 33.2 of the Collective Bargaining Agreement were included in the reprimand so that the department could recoup the money it paid to Mr. Walker. He went on to say that he reached this understanding based upon the language in the reprimand that states, "Based upon the above, upon your receipt of your final paycheck, which will include your accrued vacation, the City of Miami will deduct sixty-four (64) hours to recoup the monies paid to you for Jury Duty." Member Scarola further stated that he does not think the charges cited from the Collective Bargaining Agreement are a part of the termination charges, but that the termination is based upon violations of Civil Service Rules 14.2(p) and (q). He stated that under Rule 14.1, the Board does not know what would have happened had Mr. Walker appeared before Mr. Barket because if he had, he probably would have been given time to respond to the termination letter. Member Scarola went on to say that he had a problem with Mr. Walker's failure to show up at Mr. Barket's office to accept the letter because it has the perception that Mr. Walker abandoned his position.

Member Cruz stated that he does not believe Management's side because they do too many things to get rid of people that they do not like. He went on to say that it is very hard to scrutinize this department because it is not in the public's eye.

Member Scarola stated that he is really upset that the unions have fought for employees to continue to get paid while they perform their civic duty to either the Federal or State Governments especially since releasing persons to perform this duty becomes a burden to the City on one hand and on the other hand a burden to the Federal and State Governments when an employee is not able to take a leave to attend jury duty. He went on to say that the City has made that extra step to make sure employees are made whole (in terms of pay) regardless of the length of time a person is required to serve on jury duty.

Following discussion, the Board entered a motion to find the Appellant GUILTY of violating both charges [Civil Service Rules 14.2(p) and (q)] cited in the charging document 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: Chairperson de la O, Angel-Capo and Scarola

No: Cruz

Absent: Dames

The Executive Secretary asked if the Board was going to discuss the two violations of the Collective Bargaining Agreement that are also cited in the reprimand.

Chairman de la O responded in the negative. He stated that as Member Scarola explained and he agrees, those sections of the Collective Bargaining Agreement were included in the termination letter as a violation for purposes of pay that Mr. Walker was not entitled to; therefore, the department was rescinding his pay.

The Executive Secretary stated that she would make sure that this information is included in the findings.

The Board entered into the Penalty Phase of the Appellant's appeal hearing and at that time, the Board reviewed the Appellant's personnel file.

The Department presented no testimony or evidence during the penalty portion.

Larry D. Walker, Appellant, was recalled as a witness on his own behalf during the penalty portion of his hearing.

Questions were posed by Chairman de la O during the testimony of witness Larry D. Walker.

The Appellant rested on rebuttal. The Department waived rebuttal.

Following discussion on the penalty portion, Chairman de la O stated there is no doubt that terminating an employee is a severe punishment. He went on to say that Attorney Irizarri called it draconian but he cannot imagine that he would do any differently to an employee of his who called in to say he was on jury duty, but they were not; that he would fire that person so the question is why would the City do anything differently (in Mr. Walker's case). Chairman de la O further stated that he is not sure it is draconian because that is a tough word and he certainly thinks that 72 hours (mentioned during the testimony) is too lenient for Mr. Walker's actions.

Member Cruz stated that he thinks that a termination is too harsh; therefore, he could agree to a suspension.

Member Scarola stated that this is probably one of the toughest decisions the Board has made in the past and he does not think this will be the last termination case that comes before the Board. He went on to say that he does not think any of the Board Members take these cases lightly, but look at the facts as they are laid out and try to balance out the facts to see whether the disciplinary action is reasonable or not. Member Scarola further stated that he is aware that departments have at times overcharged employees with violations but in such instances the Board has tried to rectify the matter and the City Manager sometimes agreed with the Board and other times he did not. He stated that the case before the Board today had some possible criminal charges that probably could have been filed but in lieu of doing so, the City decided to terminate Mr. Walker's employment with the City of Miami. Member Scarola went on to say that in this case, he does not think he can second-guess the department.

Following discussion, the Board entered a motion to recommend to the City Manager that he uphold the department director's decision to terminate Mr. Larry D. Walker.

Under discussion, Chairman de la O stated that he would be willing to second Member Scarola's motion, but if neither of the other two Members second it, that means that the motion would not pass so he would rather have a couple of other votes to see if anything would pass.

Member Scarola stated that if the motion does not pass, the findings and recommendation report can reflect a tie-vote which could be forwarded to the City Manager for his review and decision.

Chairman de la O stated that the report would actually go to the City Manager as no recommendation.

Member Scarola stated that in the past employees have been terminated for stealing less and stealing more, and in this case the City chose the route of termination in lieu of criminal charges filed against Mr. Walker. He went on to say that in his opinion it was a theft when Mr. Walker did not come to work and received compensation (for those days he did not work).

Chairman de la O stated there is no way to sugar coat the actions of Mr. Walker.

Attorney Irizarri responded that the City has never presented [the information presented during the penalty discussion] and that it was something that was thrown in by Assistant City Attorney Vizcaino.

Chairman de la O stated that Mr. Walker was paid for 64 hours and there is no way to sugar-coat the actions of Mr. Walker because had Mr. Babos not checked for the jury attendance sheet, Mr. Walker would have gotten paid and would have kept the money, which is a theft. He went on to say that this is a harsh thing to say but his actions cannot be sugar-coated because that is exactly what it was - theft, and that is why he does not view the [termination] as draconian. Chairman de la O further stated that he knows it is severe and it does not make him happier than anyone else, but it is not an unfair characterization [of Mr. Walker's actions].

Following discussion the motion on the floor to terminate Mr. Walker's employment DIED FOR LACK OF A SECOND.

The motion having failed, Member Angel-Capo stated that she would hate for employees to lose that benefit (being paid by the City when attending jury duty) because one employee chose not to do the right thing. She went on to say that she believes termination in this case would be harsh and proceeded to make a motion that Mr. Walker be suspended for six months, that he lose his acting supervisor assignment, and that he return to his position of Heavy Equipment Mechanic without any backpay.

Chairman de la O asked how long had it been since Mr. Walker's termination.

Attorney Irizarri responded that Mr. Walker has been terminated for almost a year.

Chairman de la O stated that Special Counsel Everett is not present today so he is not sure if it is legal to recommend that Mr. Walker receives no backpay. He went on to say that he thinks if the recommendation is that Mr. Walker be suspended for the same length of time he was terminated, no backpay would be required. He stated that he believes if Mr. Walker is reinstated he is entitled to backpay and then asked both attorneys if they knew whether or not it would be legal to recommend that Mr. Walker receives no backpay.

Attorney Irizarri responded that the Board can make a recommendation for reinstatement without backpay, which would be a suspension for a lesser period of time.

Chairman de la O stated that is the same thing he is saying, which is the suspension would be equal to the time of Mr. Walker's termination thus far, which is from November

26, 2007 to October 21, 2008. He stated that the motion was somewhat awkward and asked Member Angel-Capo if she was willing to amend her motion to a suspension for the length of Mr. Walker's termination.

Member Angel-Capo responded in the affirmative.

Attorney Irizarri stated that he thinks this recommendation is somewhat harsh and suggested that the Board recommend Mr. Walker be reinstated and suspended for 6 months.

Following discussion, the Board entered a motion to recommend to the City Manager that Mr. Walker be suspended from November 26, 2007 through October 21, 2008, that he no longer serve as an Acting Supervisor, and that he be reinstated as a Heavy Equipment Mechanic which resulted as follows:

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

Aye: Angel-Capo and Cruz

No: Chairperson de la O and Scarola

Absent: Dames

--- As a result of the FAILED motion, Chairman de la O stated that he thinks the Board should report to the City Manager that two Board Members feel that Mr. Walker's employment with the City should be terminated whereas the other two Members feel that he should serve a lengthy suspension, lose his Acting Supervisory position and return to his position of Heavy Equipment Mechanic.

H.2

Hearing of appeal on behalf of Barbara Shaffner, Police Officer, relative to her 10-hour suspension, effective August 14, 2005.

Chairman de la O asked both attorneys if they were ready to proceed with Officer Shaffner's case today.

Assistant City Attorney Vizcaino and Attorney Rind responded that they were ready to proceed with the remaining three cases that are scheduled for today.

Chairman de la O asked Attorney Rind if she would be trying both of Officer Shaffner's cases (Item H.2 and H.3) together.

Attorney Rind responded that she would suggest that Items H.3 and H.4 be combined since they are the same issue and that they be heard before Item H.2 [which is a separate issue].

Assistant City Attorney Vizcaino stated that she would have no objection if the cases are heard in this order.

Chairman de la O asked both attorneys how many witnesses they would be calling to testify.

Assistant City Attorney Vizcaino responded that she had two witnesses and Attorney Rind responded that she had one witness.

Chairman de la O stated that there might be a chance, but he was not sure if the Board would have time to hear Officer Shaffner's case until he has heard from the other Board Members.

At approximately 1:36 p.m. the Board entered into a motion to CONTINUE Officer Shaffner's hearing and charge the continuance to the Board due to time constraints 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, Angel-Capo, Scarola and Cruz

Absent: Dames

H.3

Hearing of appeal on behalf of Barbara Shaffner, Police Officer, relative to her 20-forfeiture, effective March 3, 2005.

Chairman de la O asked both attorneys how many witnesses they had for the cases scheduled under Items H.3 (Officer Barbara Shaffner) and H.4 (Officer Kenneth McIlwain).

Assistant City Attorney Vizcaino responded that she has two witnesses and Attorney Rind responded that she has three witnesses.

Chairman de la O stated that the Board definitely would not get to hear these cases today.

Attorney Rind stated that she thinks Items H.3 and H.4 should be heard before Item H.2.

Chairman de la O stated that the Board would not get to this case because in the first scheduled case (Larry Walker - Item H.1) there are six witnesses that will be testifying and it is a dismissal case. He went on to say that there is a chance that the Board might be able to hear Item H.2, but no way can the Board hear Items H.3 and H.4 today.

Following discussion, the Board entered a motion to CONTINUE the hearings of Officer Shaffner (Item H.3) and Officer McIlwain (Item H.4) and charge the continuance to the Board which resulted as follows:

Motion by Chief Examiner Scarola, seconded by Member Dames, that this matter be CONTINUED. PASSED unanimously.

H.4

Hearing of appeal on behalf of Kenneth McIlwain, Police Officer, relative to his 20-hour forfeiture, effective March 3, 2005.

The Board CONTINUED this case due to time constraints and charged the continuance to the Board.

CONTINUED

ADJOURNMENT:

The Chairman called for a motion to ADJOURN.

Motion by Chief Examiner Scarola, seconded by Member Angel-Capo, to APPROVE. PASSED by the following vote.

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

Absent: Dames

The meeting adjourned at 3:37 p.m. Breaks were taken at 10:19-10:25 a.m., 11:32-11:43 a.m., 12:47-1:36 p.m. (LUNCH) and 2:57-3:04 p.m.

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary