

City of Miami

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

Tuesday, March 24, 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 10:21 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

SPECIAL ANNOUNCEMENT:

Member Dames announced that Jo King Reid, Union Liaison for AFSCME-Local 1907 and Plans Processing Specialist in the Building Department is retiring after 32 years of service and that she will be missed at Civil Service Board meetings, which she faithfully attended for many years. On behalf of the Board, Member Dames wished Ms. King Reid the best in her future endeavors.

A. APPROVING THE MINUTES OF:

Regular Meeting of March 10, 2009

The Board entered a motion to APPROVE the minutes of the regular meeting of March 10, 2009, which resulted as follows:

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

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

B. PERSONNEL MATTERS

- B.1 09-00302** Copy of a memorandum from Hector Mirabile, Ph.D., Director, Department of Employee Relations, requesting an extension of probation of Kimberly Chatman, Personnel Aide, for six (6) additional months beyond May 12, 2009. (DISCUSSION)

Chairman de la O asked Ms. Chatman if she was aware that the department requested to extend her probationary period an additional six months.

Kimberly Chatman responded in the affirmative.

Chairman de la O asked Ms. Chatman if she had an objection to the department's request to extend her probationary period.

Ms. Chatman responded in the negative.

Following discussion, the Board entered a motion to APPROVE the department's request to extend Kimberly Chatman's probationary period an additional six (6) months beyond May 12, 2009 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, Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz

C. MILITARY LEAVES OF ABSENCE

D. DISCIPLINARY MATTERS

- D.1 09-00225** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Armando Rigau, Police Officer, of his 10-hour suspension, effective March 8, 2009. No appeal to date. (NOTIFICATION)
NOTIFIED
- D.2 09-00300** Copy of a letter from Chief John F. Timoney, Department of Police, notifying Steven Johnson, Police Officer, of his 20-hour suspension, effective March 12, 2009. No appeal to date. (NOTIFICATION)
NOTIFIED
- D.3 09-00301** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Greicy Lovin, Crime Prevention Specialist, of her 5-hour forfeiture, effective March 5, 2009 and a copy of a request to appeal from Osnat K. Rind, Attorney on behalf of Ms. Lovin. A hearing will be scheduled in accordance with the Civil Service Rules and Regulations. (NOTIFICATION)
RECEIVED AND FILED
- D.4 09-00303** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Candace Jones, Police Officer, of her 10-hour suspension, effective March 19, 2009. No appeal to date. (NOTIFICATION)
NOTIFIED
- D.5 09-00305** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Kelvin Harris, Police Officer, of his 10-hour suspension, effective March 13, 2009. No appeal to date. (NOTIFICATION)
NOTIFIED
- D.6 09-00306** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Misael Reyes, Police Sergeant, of her 10-hour forfeiture, effective March 10, 2009. No appeal to date. (NOTIFICATION)
NOTIFIED
- D.7 09-00325** Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Reginald Kinchen, Police Sergeant, of a 40-hour suspension, effective February 9, 2009. No appeal to date. (NOTIFICATION)
NOTIFIED

E. GENERAL ITEMS

- E.1 09-00006** Copy of a Request for a continuance from Gerardo Quinones, Police Officer, relative to his 20-hour suspension, effective December 19, 2008. Diana Viscaino, Assistant City Attorney, expressed no objection to the continuance. (DISCUSSION)
Hearing of appeal is scheduled for today.
Chairman de la O asked for the scheduling history of Officer Quinones' hearing.
- The Executive Secretary responded that this is the first time Officer Quinones' hearing was scheduled and this is his first request for a continuance.*
- Following discussion, the Board entered a motion to APPROVE Officer Quinones' request for a continuance which resulted as follows:*
- Motion by Member Cruz, seconded by Member Dames, that this matter be APPROVED. PASSED by the following vote.**
- Aye:** Chairperson de la O, Member Dames, Member Angel-Capo, Chief Examiner Scarola and Member Cruz
- E.2 08-00892** Copy of Findings of Fact concerning the appeal hearing of Osian Cruz, Automotive Equipment Operator II, relative to his termination, effective August 6, 2008. (DISCUSSION)
- Chairman de la O stated that it was his understanding that Loren Cohen, Attorney on behalf of Mr. Osian Cruz would be appearing via telephone communication. He asked the Executive Secretary if she received any objections to the proposed findings from either the department or employee. [Wording in ALL CAPS represents language requested to be either added to or stricken from the findings].*
- Assistant City Attorney Vizcaino responded that she did not have any objections, but a few additions she wishes to have included in the findings. She directed the Board to the third page, finding #3, first sentence which states, "Appellant asked Mr. Vega to file a Workplace Violence incident report." Assistant City Attorney Vizcaino went on to say that her recollection of the testimony was that Mr. Cruz (Appellant) asked Mr. Vega to file a report or complaint, but not a workplace violence report; therefore she would ask that the words, "WORKPLACE VIOLENCE" be stricken.*
- Attorney Cohen stated that their position is that it is an accurate finding because that was the nature of the report that would have been prepared.*
- Following argument by both attorneys and Board discussion, the Board entered a motion to strike the words, "WORKPLACE VIOLENCE", which resulted as follows:*
- Motion by Member Cruz, seconded by Member Dames, that this matter be APPROVED. FAILED by the following vote.**
- Aye:** Member Cruz
- No:** Chairperson de la O, Member Dames, Member Angel-Capo and Chief Examiner Scarola
- Chairman de la O stated that the motion having failed, the words, "WORKPLACE VIOLENCE" that the department proposed to be stricken will remain in finding #3.*
- Assistant City Attorney Vizcaino directed the Board to the second sentence in finding #3 and asked that it be amended to read, "Mr. Vega did not file a workplace violence report AT THAT TIME." since a report was filed, but at a later time.*

Attorney Cohen stated that to add the language as proposed by the department's attorney would take the paragraphs out of sequence; therefore, he would suggest that if the Board decides to add language regarding the report being prepared at a later time that a sentence be included somewhere between findings #6 and #7 to keep the paragraphs in sequence.

Member Scarola stated that he thinks the second sentence is a valid sentence and perhaps a separate sentence could be written somewhere at the end of the findings concerning the report that was written by Francis Mitchell (Assistant Director of Public Works) some time later after the incident.

Following argument by both attorneys and discussion by the Board, the Chairman called for a motion to add the words, "AT THAT TIME" at the end of the second sentence in finding #3. Hearing none, the Chairman stated that the wording the department proposed to include to the second sentence will not be added.

Assistant City Attorney Vizcaino suggested that the second sentence in finding #5 be amended to read, "He got up from his chair, walked towards the door and raised his arm TO OPEN THE DOOR."

Attorney Cohen stated that he thinks the statement is accurate as it is written in the findings and provided the basis for his objection.

Following argument by both attorneys and Board discussion, the Board entered a motion to add the words, "TO OPEN THE DOOR" at the end of the second sentence in finding #5 as proposed by the department.

Under further discussion, Member Angel-Capo stated that she specifically remembers Mr. Munizaga's testimony was that he raised his arm when he was asked to demonstrate the incident that occurred between him and Mr. Cruz, but he never said he raised his arm to open the door.

Member Dames stated that he recalls the testimony was that the door was partially opened; therefore, Mr. Munizaga had to raise his hand to open the door fully.

Following discussion, the motion on the floor [to add the words, "TO OPEN THE DOOR" at the end of the second sentence in finding #5] resulted as follows:

Motion by Member Dames, seconded by Member Cruz, to APPROVE. PASSED by the following vote.

Aye: Member Dames, Chief Examiner Scarola and Member Cruz

No: Chairperson de la O and Member Angel-Capo

Chairman de la O asked Assistant City Attorney Vizcaino if she had any other proposed changes.

Assistant City Attorney Vizcaino responded in the affirmative. She went on to say that she would ask that the words "AND AN INJURED WRIST" be added to the end of the fifth sentence in finding #5 so that it reads, "Mr. Munizaga suffered a broken nose AND AN INJURED WRIST."

Chairman de la O asked Attorney Cohen for his position on Assistant City Attorney Vizcaino's proposed amendment to finding #5.

Attorney Cohen responded that he had no objection; however, he thinks the finding

should also include the language, "MR. CRUZ ALSO DISLOCATED HIS SHOULDER."

Assistant City Attorney Vizcaino responded that she had no objection to adding the language proposed by Attorney Cohen.

Following discussion, the Chairman stated that since both attorneys have no objections to the proposed language, the last two sentences in finding #5 will be amended to read, "Mr. Munizaga suffered a broken nose AND AN INJURED WRIST. Appellant also suffered bruises, cuts, AND DISLOCATED HIS SHOULDER."

Assistant City Attorney Vizcaino stated that she would ask that finding #7 be amended to read, "Appellant was ARRESTED by the City of Miami Police Department FOR Simple Battery AND CHARGED BY THE MIAMI-DADE STATE ATTORNEY'S OFFICE FOR ONE (1) COUNT OF SIMPLE BATTERY."

Chairman de la O asked Attorney Cohen if he had any objections to the language proposed by Assistant City Attorney Vizcaino.

Attorney Cohen responded that the word, "ARRESTED" was accurate, but he did not think the language, "CHARGED BY THE STATE ATTORNEY'S OFFICE" was accurate and provided argument in support of his objection.

Chairman de la O stated that while the State Attorney's Office does proceed under the arrest report, there is independent information that is filed by the State Attorney's Office, which is the charge. He went on to say that if "simple battery" is to remain in the findings, then he thinks the finding would also have to read, "AND CHARGED BY THE STATE ATTORNEY'S OFFICE."

Attorney Cohen stated that he think a more accurate statement would be that "MR. CRUZ WAS CHARGED BY THE POLICE DEPARTMENT."

Cynthia A. Everett, Special Counsel to the Board, stated that the intent of finding #7 was to reflect what the police had done at that point, so if there needs to be a clarification later that the State Attorney's Office prosecuted the case, this information could be added into the findings.

Chairman de la O stated that both sides agree that Mr. Cruz was arrested by the police department so the question is whether there should be something added as to what the State Attorney's Office did. He asked Attorney Cohen if he would object to the language, "AND HE WAS PROSECUTED BY THE STATE ATTORNEY'S OFFICE FOR SIMPLE BATTERY."

Attorney Cohen responded that if this language comes in, then there should be language in the findings that state, "MR. CRUZ WAS OFFERED PRE-TRIAL DIVERSION AND ACCEPTED IT."

Assistant City Attorney Vizcaino stated that she would have no objection to what Attorney Cohen just proposed.

Chairman de la O asked Special Counsel Everett to read to the Board how finding #7 would read with the proposed changes.

Special Counsel Everett responded that the finding #7 would read, "Appellant was ARRESTED by the City of Miami Police Department AND CHARGED with simple battery. HE WAS PROSECUTED BY THE STATE ATTORNEY'S OFFICE FOR SIMPLE BATTERY AND WAS OFFERED AND ACCEPTED PRE-TRIAL DIVERSION."

Chairman de la O asked Attorney Cohen if he objected to this proposal.

Attorney Cohen responded in the affirmative and provided the basis for his objection.

Following discussion, the Board entered a motion to amend finding #7 to read, "Appellant was ARRESTED by the City of Miami Police Department AND CHARGED with simple battery. HE WAS PROSECUTED BY THE STATE ATTORNEY'S OFFICE FOR SIMPLE BATTERY AND WAS OFFERED AND ACCEPTED PRE-TRIAL DIVERSION.", which resulted as follows:

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

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

No: Member Angel-Capo

Member Angel-Capo asked if the word, "ARRESTED" could be changed to "WILL APPEAR".

Assistant City Attorney Vizcaino stated that while "arrested" and "will appear" are the same, she would have an objection to changing the wording since there is another paragraph that states Mr. Cruz received a "will appear".

Chairman de la O called for a motion to change the word "arrested" to "WAS GIVEN A WILL APPEAR NOTICE". The motion DIED FOR LACK OF A SECOND. He asked the department's attorney if she had any other proposed changes.

Assistant City Attorney Vizcaino stated that she would ask that finding #8 be reworded to include language such as, "INCLUDING, BUT NOT LIMITED TO physical force with the intent to cause harm " because the way it currently reads, it seems as if [the Workplace Violence Policy] is limited to physical force with the intent to cause harm, but she believes that the policy covers many other issues.

Attorney Cohen responded that he had no objection to the proposed language.

Chairman de la O stated that he did not mind using the wording, "among other things", but the attorneys need to tell the Board what they want to have included in the findings.

Both attorneys responded that they had no objection to using the wording "AMONG OTHER THINGS" as opposed to "INCLUDING BUT NOT LIMITED TO" in finding #8.

Following discussion, Chairman de la O stated that since there are no objections, finding #8 will read as follows: "The Workplace Violence Policy (APM1-99) prohibits, among other things the use of physical force with the intent to cause harm. The policy makes no reference to the applicability of self-defense.

Chairman de la O asked Attorney Cohen if he had any proposed changes or objections to the findings.

Attorney Cohen responded in the negative.

Member Dames asked if Board Members could make proposed changes to the findings.

The Chairman responded in the affirmative.

Member Dames stated that he believes that all of the Board Members agreed that they did not feel Mr. Cruz' employment should be terminated, but he does not see this language in the findings and he thinks it should be included.

Chairman de la O asked Member Dames if he was proposing that a sentence be added under the RECOMMENDATION section of the report to read, "THE BOARD STRONGLY FEELS THAT MR. OSIAN CRUZ SHOULD NOT BE TERMINATED."

Member Dames responded in the affirmative. Member Angel-Capo suggested that the word, "Strongly" be typewritten in bold and all letters capitalized for emphasis.

Following discussion, the Board entered a motion to add a second sentence under the Recommendation Section that would read, The Board strongly recommends that the Appellant's employment not be terminated. The motion resulted as follows:

Motion by Member Dames, seconded by Member Cruz, to APPROVE. PASSED by the following vote.

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

No: Chief Examiner Scarola

Member Scarola stated that he thinks the Board needs to revisit discussion on adding somewhere in the findings language about the [Workplace Violence] report that was discussed in finding #3. He went on to say that it was felt that including this language [about when the Workplace Violence Report was written] in finding #3 would place the paragraphs out of sequential order; therefore, he would propose that this language be added after finding #6 but before finding #8.

Member Angel-Capo stated that she wants the language to specifically read that the report written by Mr. Mitchell was not prepared until after the police were called regarding the physical altercation between Mr. Cruz and Mr. Munizaga.

Chairman de la O stated that finding #7a would read, "IT WAS ONLY AFTER THE ALTERCATION AND ARREST THAT FRANCIS MITCHELL WROTE A WORKPLACE VIOLENCE REPORT." if approved by the Board.

Assistant City Attorney Vizcaino interjected and stated that she objected to the proposed language because while she would agree that it was after the incident that Mr. Mitchell drafted the report, she does not believe the testimony was that it was following the arrest that Mr. Mitchell drafted the report.

Member Angel-Capo suggested that Assistant City Attorney Vizcaino check the police report for clarification of the time when the [Workplace Violence] report was prepared.

Assistant City Attorney Vizcaino stated that regardless of how the arrest report may or may not have read, it is different from the testimony that was heard during the two-day hearing.

Chairman de la O stated that the arrest report is in evidence so it is part of the record.

Assistant City Attorney Vizcaino responded that she did not think the workplace violence report had the time stamped on it.

Member Cruz stated that he did not understand why the discipline issued by the department for the fighting incident that occurred in Coconut Grove did not receive the same parity as was issued in Mr. Cruz' case.

Chairman de la O suggested that the Board resolve the issue at hand first and afterwards consider the issue brought up by Member Cruz.

Member Scarola stated that he did not know if the actual evidence was ever presented as to a specific time [the Workplace Violence Report] was written, but he does know that the report was written after the incident occurred, but he did not know if it was written before or during the arrest because the report could have been started [by Mr. Mitchell], but the Board does not know if this was the case.

Member Angel-Capo stated that the report was written after the fact and this is why she thinks it is important that the Findings are specific so that [the City Manager or any other person] who has not heard the testimony would clearly understand what happened by reading what is included in the report. She went on to say that the physical altercation occurred, the police were called, and then the report was written; therefore, she thinks it is important that the report indicate that Mr. Cruz did request a report, that it was not written that morning even though Mr. Mitchell was available to do so, and that Mr. Cruz was told that he would not get a report until the following Monday.

Chairman de la O stated that it is Member Scarola's motion so he can decide whether to amend his motion.

Member Scarola stated that he was withdrawing his motion.

Chairman de la O stated that due to the withdrawal of the motion, any Board Member was free to make a motion (regarding adding language in the findings about the time for which the report was written).

Member Angel-Capo stated that she had no objection to whomever was making a motion, but she felt that it was important to include information as to when the report was prepared.

Member Cruz asked the Chairman to clarify the motion on the floor.

Chairman de la O stated that the motion was withdrawn so there was no motion on the floor. He called again for a motion on whether to add into the findings information on when the workplace violence report was written. Hearing none, Chairman de la O stated that language about the time for which the report was written would not be included and asked Member Cruz if he wished to take up discussion regarding the issue he raised with regards to the fighting incident that took place in Coconut Grove.

Member Cruz responded in the negative.

Chairman de la O called for a motion to APPROVE the proposed findings of fact as amended. The motion 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

F. REPORTS

F.1 09-00002 Pending Hearings as of March 24, 2009. (NOTIFICATION)

G. REQUESTS FOR HEARINGS**H. TODAY'S HEARINGS**

- H.1 05-00873** Hearing of appeal on behalf of Reginald Kinchen, Police Sergeant, relative to his 20-hour forfeiture, effective July 27, 2005.
- The Chairman called for the hearing of Sgt. Reginald Kinchen and asked the Executive Secretary if he was present.*
- The Executive Secretary responded in the negative.*
- Chairman de la O asked the Executive Secretary to try to make contact with Sgt. Kinchen via telephone.*
- Member Dames asked if Sgt. Kinchen intends to be present for his hearing.*
- Chairman de la O stated that it seemed apparent that Sgt. Kinchen would be present for his hearing since his witness (Sgt. Teresa Borkowski) is present. He went on to say that the Board will go forward with Sgt. Kinchen's case today since the department has the burden (of proof) and Sgt. Kinchen's witness could still testify even if he does not show up for his hearing.*
- Member Dames asked for the number of times Sgt. Kinchen's hearing was scheduled.*
- The Executive Secretary stated that Sgt. Kinchen's hearing was scheduled and continued eight (8) times. She went on to say that Sgt. Kinchen's hearing was continued and charged to the Board five (5) times due to insufficient time to hear his case, two (2) continuances were requested and granted on behalf of the employee and one (1) continuance was granted on behalf of the department. The Executive Secretary stated that before the Board proceeds with the hearing, Sgt. Borkowski has requested to provide information with regards to her attempts to contact Sgt. Kinchen.*
- Sgt. Teresa Borkowski appeared before the Board and stated that she tried contacting Sgt. Kinchen via his telephone; however, she received a recording which indicated that he had not set up his mailbox as yet. She went on to say that she contacted Court Liaison and spoke with Sgt. Diaz, who informed her that according to the calendar, there was no [indication of a subpoena] for Sgt. Kinchen to be present today. Sgt. Borkowski stated that she provided this information to the Board because the last time Sgt. Kinchen's hearing was scheduled, he was not aware and she notified him to be present.*
- Chairman de la O asked Sgt. Borkowski if she tried to contact Sgt. Kinchen this morning. Sgt. Borkowski responded in the affirmative.*
- Chairman de la O asked the Executive Secretary to put on the record how the Board notified Sgt. Kinchen of his hearing today.*
- The Executive Secretary stated that the most recent letter dated March 2, 2009 notifying Sgt. Kinchen of his scheduled hearing was sent to the address provided by Sgt. Kinchen for his correspondence.*
- Chairman de la O asked if [sending letters via U.S. mail] the norm for notifying appellants of their scheduled hearings.*
- The Executive Secretary responded in the affirmative. She went on to say that each*

time Sgt. Kinchen's hearing was scheduled, a letter was mailed [to the same address provided by him] and not once was the letter ever returned for an incorrect address.

No other discussion took place about Sgt. Kinchen's absence.

The Board entered into the scheduled hearing of Sgt. Reginald Kinchen and proceeded pursuant to Civil Service Rule 14.7, "Failure of Parties to Appear", which states in part, "If the employee notified shall fail to appear at the time fixed for the hearing, the Board shall hear the evidence and render judgment thereon."

Diana Vizcaino, Assistant City Attorney, represented the department.

Reginald Kinchen, Police Sergeant (Appellant), failed to appear for his hearing.

Assistant City Attorney Vizcaino waived opening statements.

The Rule of Witnesses was invoked and all witnesses were sworn in individually. Witnesses for the department appeared in the following order:

Judith Bezark, Police Lieutenant (Retired), City of Miami, Department of Police.

Questions were posed by Board Members Dames, Cruz, Scarola, and de la O during the testimony of witness Judith Bezark.

The department rested its case.

Witnesses for the Appellant testified in the following order:

Teresa Borkowski, Police Sergeant, City of Miami, Department of Police.

Questions were posed by Board Members Dames and Cruz during the testimony of witness Teresa Borkowski.

There being no other witnesses to testify on behalf of the Appellant, the Board proceeded to closing argument, which was presented by the department.

Following closing argument by Assistant City Attorney Vizcaino, Member Dames stated that Sgt. Borkowski provided credible testimony reference the roll call incident; therefore, he thinks there was a misunderstanding between Lt. Bezark and Sgt. Kinchen. He went on to say that during the counselling session (that consisted of Commander Bobbie Meeks, Lt. Judith Bezark, and Sgt. Reginald Kinchen), certain things were said [by Lt. Bezark and Sgt. Kinchen] that caused egos to be bruised; however, he thinks that if Sgt. Kinchen had said something belligerent, the Commander would have taken hold of the situation. Member Dames further stated that the absence of the Commander's signature on the reprimand is, in his opinion, an indication that he disagreed with the reprimand.

Member Scarola stated that one of the problems he has is that Lt. Bezark testified that the issuance of the reprimand to Sgt. Kinchen was only as a result of what happened in the counseling session; however, when he read the first two charges [Insubordination, Obeying and Executing Orders] cited in the reprimand, this told him that this reprimand did have something to do with what occurred before the session. He went on to say that there may have been some miscommunication during the session, but he thinks the reprimand resulted because Lt. Bezark did not like Sgt. Kinchen's response [to the

questions she posed to him in a red-line memo.]

Member Cruz stated that based on the speedy trial rule [CSR 14.3], he thinks all of the charges brought against Sgt. Kinchen should be dismissed. He went on to say that this case is approximately five years old and to bring it before the Board is a laughing matter and there could be no justice [served in this case.]

Chairman de la O responded that [he did not see how the Board could dismiss the charges] when the fact is the employee has failed to appear for his hearing.

Following discussion, the Board entered a motion to find the Appellant NOT GUILTY of all of the charges.

Under discussion, the Chairman stated the fact that the Appellant is not present is obviously unfortunate, but the department has presented testimony as to what happened in that meeting. He went on to say that if Board Members feel that what happened in the meeting was insubordinate, then Sgt. Kinchen should be found guilty of the insubordination charge and if not, Board Members should vote to find him not guilty.

The motion on the floor resulted as follows:

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

Aye: Member Angel-Capo and Member Cruz

No: Chairperson de la O, Member Dames and Chief Examiner Scarola

The motion having failed, the Chairman stated that the cited charges in the reprimand will be considered individually. He called for a motion on Charge #1 - Insubordination - Departmental Order 1.11.6.17.8.

The Board entered a motion to find the Appellant NOT GUILTY of Charge #1.

Under discussion, Member Cruz stated that the Board only heard one side of the case because Sgt. Kinchen was not present so he did not see how the Board could find the Appellant guilty of this charge.

Chairman de la O asked Member Cruz if he was going to vote to find the Appellant not guilty because the Appellant was not present for his hearing. He went on to say that if this is the mindset of Board Members, then it would only encourage employees not to show up for their hearings.

Following discussion, the motion on the floor DIED FOR LACK OF A SECOND.

The Board entered a motion to find the Appellant GUILTY of Charge #1 which resulted as follows:

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

Aye: Chairperson de la O, Member Dames and Chief Examiner Scarola

No: Member Angel-Capo and Member Cruz

The Board entered a motion to find the Appellant NOT GUILTY of charge #2 - Obeying and Executing Orders - Departmental Order 1.11.6.13.12 which resulted as follows:

Motion by Chief Examiner Scarola, seconded by Member Dames, 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

The Board entered a motion to find the Appellant NOT GUILTY of Charge #3 - Permission to By-Pass Rank which resulted as follows:

Motion by Chief Examiner Scarola, seconded by Member Dames, 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

The Board entered a motion to find the Appellant GUILTY of Charge #4 - Act of Insubordination - Civil Service Rule 14.2 (e) 1.

Under discussion, Member Cruz stated that the Board only heard the testimony of retired Lt. Judith Bezark because Sgt. Kinchen was not present. He went on to say that he could not vote in favor of this motion because he did not have any evidence such as a videotape, etc. of what happened at the roll call.

Following discussion, the motion on the floor resulted as follows:

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

Aye: Chairperson de la O, Member Dames and Chief Examiner Scarola

No: Member Angel-Capo and Member Cruz

The Board entered a motion to find the Appellant NOT GUILTY of charge #5 - Breach of Proper Discipline - Civil Service Rule 14.2(e) 2 which resulted as follows:

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

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

Following the vote on the charges, the Board proceeded to the Penalty Phase of Sgt. Kinchen's hearing. His personnel file was reviewed by the Board which revealed 72 commendations, 12 Good Citizen letters, 16 reprimands, plus three reprimands that resulted in forfeitures of 5, 20, and 12.5 hours of earned overtime.

The Board heard final argument by Assistant City Attorney Vizcaino on the penalty portion of Sgt. Kinchen's hearing after which the Board entered discussion on the penalty.

Member Scarola stated that his concern is that all of sudden there appeared to be a [disciplinary] issue starting in the late part of 2001 with Sgt. Kinchen that progressed and the only thing the department did was reprimand him, but never once suggested any type of training [to correct the problem]. He went on to say that he finds that an employee who has been employed with the City since 1985, has moved through the ranks with numerous commendations and all of a sudden has an explosion [of reprimands] seemed suspicious. Member Scarola further stated that he did not know if it was a turnover with the leadership of the Miami Police Department or whatever else at the time that led to Sgt. Kinchen's progression of disciplinary actions, but he is aware there had been some going back and forth at the sergeant's level as to duties and responsibilities [which could have contributed to Sgt. Kinchen's actions.]

Member Dames asked if it had been five years since Sgt. Kinchen received disciplinary action.

The Executive Secretary responded that the memo [that provides Sgt. Kinchen's history of commendations, reprimands, etc.] covers the period of time he was hired through the effective date of the reprimand that is before the Board today.

Member Dames asked if the last disciplinary action Sgt. Kinchen received was in 2004.

The Executive Secretary responded that Sgt. Kinchen's reprimand before the Board is effective July 25, 2005; therefore, the [disciplinary] issues prior to that date are addressed in the memo provided to Board Members.

Member Dames clarified that although the Board would not consider any disciplinary action beyond July 25, 2005, there could be other disciplinary actions that were issued to Sgt. Kinchen after this date.

The Executive Secretary responded in the affirmative.

Chairman de la O stated that the Board is issuing discipline as if it was being issued on July 25, 2005.

Following discussion, Member Dames made a motion to uphold the department's decision that Sgt. Kinchen forfeit 20 hours of earned overtime.

Prior to receiving a second to the motion, Chairman de la O stated that he would second the motion if he knows that it is not going to fail, but it did not seem to be a favorable motion for the majority of the Board Members. He asked the Board Members if the reason they were not seconding the motion was because they wanted either a higher or lower penalty.

Following no response to the Chair's question and hearing no second to the motion, Chairman de la O stated that the motion to uphold the department's recommendation of a 20-hour forfeiture FAILED.

Member Scarola made a motion to recommend to the City Manager that the Appellant forfeit 10 hours of earned overtime. The motion DIED FOR LACK OF A SECOND.

The motion having failed, the Board entered a motion to recommend to the City Manager that Sgt. Kinchen receive a reprimand only.

Under discussion, Member Dames stated that he thought it was very disrespectful of Sgt. Kinchen not to show up for his hearing and his witness did. He went on to say that Sgt. Kinchen probably could have won his case, but he did not appear for his hearing. Member Dames further stated that Sgt. Kinchen's failure to show up makes him mad because it appears that Sgt. Kinchen is using the Board [to his benefit].

Chairman de la O stated that he has always said there has to be a reason not to uphold the department's punishment and it is obvious that the Board did not hear a good reason not to uphold the department's punishment [in this case] because the Appellant failed to appear for his hearing. He went on to say that upon review of the Appellant's personnel file, it revealed that he received many reprimands; therefore, if anyone was concerned about progressive discipline being followed, the 20-hour forfeiture imposed by the department would be in line with the discipline the Appellant received before, [which was also a 20-hour forfeiture]. Chairman de la O further stated that he did not hear any good reason not to support what the department had done [in terms of the penalty] and that the Board should not be second-guessing unless it has a good reason to do so. He stated that to lower the penalty to a reprimand is unconscionable given the Appellant's

record and the lack of basis for reducing [the penalty].

Member Scarola stated that the City Manager can overturn the Board's recommendation and order the original penalty [20 hour forfeiture] so at the end of the day, he knows what is going to happen regardless of what the Board's recommendation to the City Manager would be. He went on to say that he understands that the Chairman is saying that in good faith, the Board should not be made a mockery by not going along with the department's recommendation, but in the end the City Manager is going to have the final authority as to the penalty.

Chairman de la O stated that he does not disagree with Member Scarola, but at the end of the day, the Board needs to do what is right regardless of what the City Manager is going to do in this case. He went on to say that he does not think it is right that Sgt. Kinchen receive a reprimand only.

Following discussion, the motion on the floor [that the Appellant receive a reprimand only] resulted as follows:

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

Aye: Member Angel-Capo and Member Cruz

No: Chairperson de la O, Member Dames and Chief Examiner Scarola

The motion having failed, Member Cruz made a motion to recommend to the City Manager that the Appellant forfeit 5 hours of earned overtime. The motion DIED FOR LACK OF A SECOND.

The Board entered a new motion to recommend to the City Manager that the Appellant receive a 10-hour forfeiture which resulted as follows:

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

Aye: Chief Examiner Scarola and Member Cruz

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

Chairman de la O stated that because of the failed motions on the penalty, the Board may want to send a report to the City Manager without a recommended penalty. He went on to say that as he sees the splits of the votes, he and Member Dames are in favor of upholding the department's recommendation of a 20-hour forfeiture, Members Angel-Capo and Cruz are in favor of less than 10 hours of earned overtime and Member Scarola is in favor of a 10-hour forfeiture. Chairman de la O stated that unless Member Scarola votes in favor of a 20-hour forfeiture or Member Dames is willing to vote for less than a 20-hour forfeiture, he does not think the Board could reach a resolution because it is dead-locked.

Following discussion, Member Cruz made a motion to recommend to the City Manager that the Appellant forfeit 12.5 hours of earned overtime. The motion DIED FOR LACK OF A SECOND.

The Board entered a motion to make no recommendation for a penalty since the Board was unable to reach a consensus.

Under discussion, Chairman de la O asked if the Board could indicate in the report to the City Manager, the Board's split on the vote.

Special Counsel Everett stated that the Board has done this before, but she believes it was because of a tie-vote.

Chairman de la O stated that he thinks the City Manager should be made aware of what each Board Member's vote is and let the City Manager decide the penalty, but if it cannot be done, Special Counsel Everett should advise the Board.

Special Counsel Everett stated that the Board could recommend what it feels is appropriate, but then the record would need to be clear as to [what penalty]each Board Member is recommending.

Chairman de la O asked if there was any objection to Board Members stating what they feel the recommended penalty should be. Hearing none, the Chairman stated that he welcomes further discussion on this issue or each Board Member could indicate their recommended penalty on the record.

Member Scarola stated that the Board has stated its position, but unfortunately it has been unable to reach a consensus on the penalty.

Chairman de la O stated that the Executive Secretary could call the roll and each Board Member could state what they feel should be the penalty.

The Executive Secretary stated that there was a motion on the floor [made by Member Scarola] to send no recommendation regarding the penalty and asked if it was withdrawn.

Member Scarola stated that he withdrew his motion.

Following discussion, the roll was called and each Board Member stated what they felt should be the recommended penalty which resulted as follows:

*Member Angel - Capo - Reprimand Only
Member Scarola - Reprimand + 10-hour forfeiture of earned overtime
Member Cruz - Reprimand + 12.5-hour forfeiture of earned overtime
Member Dames - Reprimand + 20-hour forfeiture of earned overtime
Chairman de la O - Reprimand + 20-hour forfeiture of earned overtime*

APPROVED : FINDINGS WILL BE SENT TO THE CITY MANAGER WITH THE INDICATED RECOMMENDATIONS SINCE THE BOARD WAS UNABLE TO REACH A CONSENSUS ON THE PENALTY.

H.2 09-00006

Hearings of appeal on behalf of Gerardo Quinones, Police Officer, relative to his 20-hour suspension, effective December 19, 2008.

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

CONTINUED

ADJOURNMENT:

The Chairman called for a motion to ADJOURN 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

The meeting adjourned at 12:08 p.m. A break was taken from 10:52-11:01 a.m.

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary