

City of Miami

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Meeting Minutes

Tuesday, November 17, 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 10:14 a.m. The roll call at the commencement of the meeting was as follows:

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

Absent: Member Dames

Member Dames was absent due to an emergency.

A. APPROVING THE MINUTES OF:

Regular Meeting of November 3, 2009.

Motion by Chief Examiner Scarola, seconded by Chairperson de la O, to APPROVE. PASSED by the following vote.

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

Absent: Dames

B. PERSONNEL MATTERS**B.1**

Copy of a memorandum from Diana Gomez, Director, Department of Finance, requesting an extension of probationary period of Gloria Lopez, Senior Finance Accounting Analyst, for three (3) additional months beyond December 1, 2009. (DISCUSSION)

Chairman de la O asked Ms. Lopez if she was aware that the department requested to extend her probationary period and if so, whether she had an objection. Gloria Lopez responded that she was aware the department requested to extend her probationary period and that she had no objection.

Following discussion, the Board entered a motion to APPROVE the department's request to extend Gloria Lopez' probationary period an additional three (3) months beyond December 1, 2009 which resulted as follows:

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

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

Absent: Dames

C. MILITARY LEAVES OF ABSENCE**C.1**

Vincent F. Miller, Police Officer, requests re-employment as a Police Officer following his return from military leave. (DISCUSSION)

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

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

Absent: Dames

C.2 Genesis Troutman, Park Ranger, requests re-employment as a Park Ranger following her return from military leave. (DISCUSSION)

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

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

Absent: Dames

D. DISCIPLINARY MATTERS

E. GENERAL ITEMS

F. REPORTS

F.1 Pending Hearings as of November 17, 2009. (NOTIFICATION)

PRESENTED

G. REQUESTS FOR HEARINGS

G.1 Copy of a Request for a Whistleblower Hearing from Robert Anthony Bogdan, Attorney, on behalf of Steven S. Wolf, Investigator, relative to his termination, effective October 1, 2009. (DISCUSSION)
Deferred from the meeting of November 3, 2009.

Chairman de la O asked Attorney Bogdan if there was anything he wished to add to the complaint he submitted on behalf of his client, Steven Wolf. Attorney Bogdan responded that he is asking that his client's request for a hearing be granted by the Board.

Chairman de la O asked for the department's position on Mr. Wolf's request for a Whistleblower hearing. Barnaby Min, Assistant City Attorney (ACA) responded that based upon the documents that were provided, there was not a prima facie violation of Fla. Statute 112.3187 since (according to the Statute) no written complaint (from Mr. Wolf) was addressed to the Chief Executive concerning protected activity.

Chairman de la O asked Attorney Bogdan for his position on the department's argument as to why his client should not be granted a Whistleblower hearing. Attorney Bogdan responded that there is no requirement in the Statute for a written complaint to the Chief Executive whereas there are other means of communicating (malfeasance). He went on to say that his client believes there were malfeasance, misfeasance and he has taken appropriate measures (to communicate them); therefore if the Board grants his client a hearing, they would present all of the evidence, but he did not know if this was the forum to do so.

Chairman de la O responded that this is the forum for jurisdiction. He went on to say that he was not saying that ACA Min was right, but his argument is if there is not a written complaint to the Chief Executive Officer of the entity, then there is no basis for a Whistleblower complaint. Chairman de la O asked ACA Min to identify the Statute referencing his argument that written communication must be received by a Chief Executive Officer in order for someone to claim a Whistleblower violation. ACA Min pointed the Board to Fla. Statute 112.3187(6) which requires disclosure to the Chief

Executive Officer as well as 112.3187(7) which requires the complaint to be written and signed. He went on to say that pursuant to 112.3187(5)(b), an opinion or a belief that there has been malfeasance is not the same as the disclosure of malfeasance.

Chairman de la O stated the Statute indicates "a" Chief Executive Officer as opposed to "the" Chief Executive Officer so he would like to know what is cited in Fla. Statute 447.203(9) that defines Chief Executive Officer. ACA Min stated that the Statute mentions that the Governor would be the Chief Executive Officer of the State of Florida or any other similar body in a municipal entity; therefore, the City Manager would be the Chief Executive Officer.

Chairman de la O asked ACA Min if it was his position that the Whistleblower claim has to be disclosed to the City Manager. ACA Min responded in the affirmative.

Chairman de la O asked ACA Min what the term "or other local officials" means as cited in the Statute. ACA Min responded that the other agencies as described in the Statute is listed in 112.3187(6) as the Office of the Chief Inspector, agency inspectors, and other agencies that are involved in investigating Whistleblower complaints.

Chairman de la O asked ACA Min to refer him to the section of the Statute that mentions the complaint must be in writing. ACA Min referred the Board to 112.3187(7). Chairman de la O responded that the complaint does not have to always be written, but it can be pursuant to oral testimony. ACA Min stated that it is the department's position that the complaint has to always be in writing.

Chairman de la O stated that the first section protects a person if it is done in writing. He went on to say that the section also states that if a person is requested to participate in an investigation, hearing, or other inquiry, the person is protected if he refuses to participate in any adverse action prohibited by this section, so the complaint does not always have to be in writing.

ACA Min stated that the Statute also states "or employees who file any written complaint to supervisors, officials, or employees who submit a complaint to the Chief Inspector General..." so it is the department's position that it has to be a written complaint.

Chairman de la O asked Attorney Bogdan for his position on the department's argument that the complaint must be made in writing. Attorney Bogdan responded that he disagreed with the department's argument. He went on to say that while the Statute does not say that the complaint must always be in writing, on numerous occasions his client wrote to his supervisor, personnel, and panel members of the Civilian Investigative Panel (CIP) about his concerns which is in compliance with subsection 6 of the Statute.

ACA Min stated that members of the CIP would not be considered appropriate local officials.

Chairman de la O asked if there was any case law determining what the phrase "local officials" means. Attorney Bogdan responded that he had not been able to find any. He went on to say that the language is very broad; however, an employee would (generally) take a complaint to his supervisor. Attorney Bogdan further stated that he thought it would be a poor reading of the Statute if it is to be understood that the written complaint had to be given to a specific individual.

Chairman de la O read a portion of the Statute, 113.3187(7) which states, "...employees who file any written complaint to their supervisory officials..." and asked ACA Min if he would concede that the CIP members are supervisory officials of Mr. Wolf. ACA Min responded that he could not agree because according to his (Wolf's) job description, he

does not report to the CIP, but answers to non-Members of the CIP such as the Independent Counsel.

Chairman de la O asked ACA Min if the Independent Counsel reports to the CIP. ACA Min responded in the affirmative.

Chairman de la O asked if Mr. Wolf reports to the Independent Counsel who in turn reports to the CIP Members why wouldn't these be supervisory officials. ACA Min responded that it is a direct chain of command.

Chairman de la O asked Mr. Mays if wished to comment on this matter. Charles Mays, Independent Counsel, Civilian Investigative Panel, responded in the affirmative. He went on to say that a Whistleblower complaint can be written or verbal, but an oral disclosure [would come] about in the course of testimony or something of that nature. He went on to say that the Statute that makes reference to Whistleblower complaints is Fla. Statute 447.203(9), which makes reference to a person who in fact reports to the legislative body, which (in this case) would be the City Commission; therefore the disclosure must be made either to the City Manager or his designee which is the person in charge of Employee Relations/Labor Relations. Mr. Mays further stated that the question that goes to jurisdiction is whether Mr. Wolf made an appropriate disclosure to the appropriate official and the answer is he did not.

Chairman de la O asked Mr. Mays to help him understand how he reconciles subsection 6 which says "to a Chief Executive Officer as defined in 447.203" with subsection 7 which says, "or an employee who files a written complaint to their supervisory officials", because subsection 7 seems to delimit it quite a bit. Mr. Mays responded that there was nothing in the documents submitted by Mr. Wolf that indicated or intimated in any way, shape, form, or manner that he made a written complaint to any of his supervisory officials.

Chairman de la O asked Attorney Bogdan what was the written complaint that Mr. Wolf made. Attorney Bogdan responded that Mr. Wolf made innumerable communications to the CIP Members and that several months ago, he (Bogdan) sent correspondence to the CIP's counsel protesting a plan to reduce Mr. Wolf's salary and letting them know if they did, that would be a violation of the Whistleblower Statute.

Chairman de la O stated that would seem to be the cause of the (pay) reduction, but that is not a whistleblower if someone were to say they were going to reduce an employee's pay and the employee in turn says the superior was doing some wrong things. He went on to say that a whistleblower is supposed to be that a person claims that a superior is doing wrong things and then the employee is retaliated against by having his salary reduced, but the employee does not get to immunize himself by complaining after the process is in place. Chairman de la O further stated if the Board were entertaining the notion that the CIP (members) counted as a supervisory official, he would like Attorney Bogdan to tell the Board what written communication did Mr. Wolf make to the CIP Members about violations of the law.

Attorney Bogdan responded that Mr. Wolf sent innumerable e-mails to members of the CIP. He went on to say that at some point if the Board would like him to submit those documents for review, he could do so.

Chairman de la O responded that there may be 20 e-mails that he could show to the Board; however, he would like for Attorney Bogdan to show him the worst e-mail Mr. Wolf sent to the CIP complaining about activities that violate the City Charter and/or the law and then the Board can debate the jurisdiction once it knows that these facts are in place.

Attorney Bogdan stated that when he sent a letter protesting the fact that there was a plan to reduce Mr. Wolf's salary and that they believed this would be a violation of the Whistleblower Statute because of prior reports of malfeasance, etc., then the termination following that would also from a prima facie standpoint be a Whistleblower claim so the reduction in salary never took place.

Attorney Mays stated that the law simply does not support that sort of logic or reasoning (as stated by Attorney Bogdan). He went on to say that it is correct from the standpoint that an employee cannot immunize himself instead the employee must engage first in certain protected activity and as a direct consequence of engaging in that activity and making a proper disclosure of that activity, retaliation comes about. Attorney Mays further stated that in Mr. Wolf's case, they are totally transmogrifying and bastardizing the entire process by saying that he was laid off and the reason he was laid off was due to whistleblower activity. He stated there is no analysis present in that sort of presentation; therefore, he would urge the Board to think critically about this matter from the standpoint of what is set forth in the four corners of the documents Mr. Wolf filed that comports with the law.

Chairman de la O asked Attorney Mays if he qualified as an official for jurisdictional purposes since Attorney Bogdan's position is that [his client] sent documentation to him (Mays). Attorney Mays responded in the negative. He went on to say that the only individuals that would qualify as officials for jurisdictional purposes would be the City Manager or his designee, or in the alternative something to his direct supervisor setting forth a protected activity, which would be the Executive Director. Attorney Mays further stated that there is nothing set forth in the numerous pages submitted by Mr. Wolf that sets forth that proposition, ergo there is no jurisdiction.

Chairman de la O stated that the employee's position is that his supervisor was the Executive Director.

Attorney Mays agreed that it was the Executive Director and at a later point in time was the interim Executive Director, but what is also even more telling from the standpoint of the absence of any legal or factual merit regarding the matters that have been submitted, is that in and of itself, it does not speak to any so-called protected activity, instead it resonates with Mr. Wolf's frustrations that he was not treated in a manner that he thought he should have been treated.

Chairman de la O asked if the failure of the CIP to follow through on investigations, which goes to the core of its mission and is one of the things Mr. Wolf is complaining about, would qualify as a Whistleblower/protected activity - to complain that the CIP is not following through on its core mission.

Attorney Mays responded that assuming that is true for the purpose of this discussion, then the question would become whether or not there has been a proper disclosure.

Chairman de la O stated that he was going back to the point Attorney Mays made which was fundamentally when you look within the four corners of the complaint Mr. Wolf has been making, there is no activity that he has been complaining about that would give the Board jurisdiction, so assuming Mr. Wolf forwarded the information to the correct entity, he (Chairman) was then focusing on the content of his complaint and he is trying to see if the Board could at least reach some common ground since [Mr. Wolf] is complaining about (staff not performing) the core mission of the CIP, which is to investigate police wrongdoing and his accusation is things are being ignored or shelved, which seems it would qualify as a whistleblower.

Attorney Mays stated that he agrees with the Chairman, but perhaps he engaged in a confluence of knowing the truth and the law.

Chairman de la O stated that a little progress was made, but the Board still needs to determine if there is jurisdiction (for granting a hearing). He asked what the written communications were that Mr. Wolf based his argument on. Attorney Bogdan responded that he was not prepared to go into those types of facts but his client could explain some of the communications he has made.

Steven Wolf, former CIP Chief Investigator, stated that he was not prepared to go into any presentation of evidence because he thought this was just a determination of whether he is eligible for a hearing. He went on to say that based upon the information he heard today, the issue is whether he communicated whistleblower activities to the Executive Director or the Chief Executive of the City. Investigator Wolf further stated that over the course of approximately two years what he did do as the Chief Investigator for the CIP was that he communicated his concerns with almost 50% of the Panel who have reached out to him expressing their concerns about what the mission was for the CIP and the mission obviously was to investigate complaints and to make recommendations to the Police Department on how to improve their operations. He stated that he also sat down at the request of several Panel Members and City Commissioners and in an outline form, addressed all of the concerns he laid out in his 15-page memo that he believes the Board has seen. Investigator Wolf went on to say that he has over 100 e-mails encompassing communications with Panel Members and the (CIP) Chair who encouraged him to come to her with his problems and concerns on how CIP was being operated and the fact that she wanted to make adjustments for some of those perceived management issues.

Chairman de la O stated that he understands that Attorney Bogdan nor his client came prepared to put on a presentation, but what he is asking from Mr. Wolf or his attorney is any written communications on issues such as the accusation he (Wolf) made regarding matters that were not being investigated, but shelved somewhere and investigations that were being closed without any Probable Cause findings that should have been investigated. He went on to say that while he did not think issues of management would qualify as whistleblower activity unless someone is breaking the law, he did think that violating the City Charter by not following through on the core mission of the CIP would qualify. Chairman de la O further stated that the purpose of this discussion is to make sure the Board has jurisdiction and the Board wants to exercise that jurisdiction in hearing the case. He stated that if Attorney Bogdan and his client have something for the Board to review that would be useful or if they would like to reschedule this item to get things together that would be fine because at the end of the day, the Board has no case law so it might help both sides to brief the issue on what is a sufficient person or entity to complain to that would give the Board jurisdiction. Chairman de la O further stated that if he were to interpret (what is a sufficient person or entity to complain to) based on the Statute, he would have to say most of what was presented (by Mr. Wolf and his attorney) is not enough (to qualify as whistleblower activity), but he would concede that he does not know exactly what some of the terms mean in the Statute. He reiterated if Mr. Wolf had just one written communication that covers the core issues, that would be very helpful in establishing the factual record.

Mr. Wolf stated that he would like to request time so that he could look through the e-mails to find what the Board is specifically requesting.

Member Cruz stated that he was very happy to see someone complaining about the CIP. He went on to say that he has yet to see a report generated by the CIP.

Following discussion, Member Cruz made a motion to grant Mr. Wolf's request for a

hearing; the motion DIED FOR LACK OF A SECOND.

The Board entered a motion to DEFER this matter to meeting of December 1, 2009 which resulted as follows:

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

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

Absent: Dames

Following the Board's vote to defer Mr. Wolf's request to the Board's next meeting, Attorney Mays stated that he has done research and litigated (whistleblower) cases in the past so he would be glad to share with opposing counsel the research he has done that describes who the disclosure must be made to and perhaps this would expedite matters.

No other discussion took place on this matter.

G.2

Copy of a Request for a Whistleblower Hearing from Nicolas A. Manzini, Attorney, on behalf of Roy Brown, Police Major, regarding several allegations of retaliation in connection with FDLE Investigation of the City's Police Department. (DISCUSSION)

Diana Vizcaino, Assistant City Attorney (ACA), stated that her Assistant advised her that Attorney Manzini had to appear before the Third District Court of Appeals this morning and would not be attending today's meeting. She went on to say that Attorney Manzini advised her that he felt he did not need to be in attendance based on the documents he presented, so at this point she did not know if the Board wanted to proceed or offer Mr. Manzini another opportunity to be present.

Chairman de la O stated that the problem would be if the Board has any questions of Attorney Manzini or his client, neither one is present to answer them. He went on to say that he is prepared to discuss the matter, but it is the Board's pleasure to either discuss or table the matter.

Member Scarola stated that he preferred to table the matter to the next meeting since there are accusations that need to be presented and there may be some back and forth arguments on issues so he thinks either Major Brown or his attorney needs to be present to answer questions the Board might ask. He went on to say that the employee could end up losing his case in court if he did not exhaust his administrative remedies first.

Chairman de la O asked if the department's attorney was ready to concede that the Board should hold a hearing. ACA Vizcaino responded that she had no objection to deferring this matter.

Chairman de la O asked if the department was objecting to the employee's request for a hearing. ACA Vizcaino responded in the affirmative.

Following discussion, the Board entered a motion to DEFER this matter to the meeting of December 1, 2009 which resulted as follows:

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

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

Absent: Dames

H. TODAY'S HEARINGS

H.1 Continuation of the Hearing of appeal on behalf of Clive Vernon, Police Officer, relative to his termination, effective December 1, 2008.

Chairman de la O asked both attorneys if they were ready to proceed with the continuation of Officer Vernon's hearing. Attorney Guttman-Valdes responded that she was ready to proceed and that she was also prepared to request a continuance so that she could have all Board Members present that heard the other days of testimony.

Chairman de la O stated that Member Dames had an emergency therefore he would not be present for Officer Vernon's hearing. He went on to say that Member Cruz watched the hearing on cable television, he was also given a copy of the DVD to view the hearing so he is ready to proceed, argue, and vote in this hearing. Chairman de la O further stated that three Board Members are available which constitutes a quorum to continue with Officer Vernon's hearing today; however, Attorney Guttman-Valdes could still make her motion for a continuance.

Attorney Guttman-Valdes stated that she would ask that Officer Vernon's hearing be continued until Member Dames is present to hear his case.

Chairman de la O asked for the department attorney's position on the employee's request. ACA Min responded that he opposed the employee's request for a continuance. He went on to say that this would be the fourth day of hearing this case and that it needs to be finished today. ACA Min further stated that assuming Officer Vernon was wrongfully terminated, he should obviously return to his employment as soon as possible and if he was not lawfully terminated, he thinks the matter should be finalized so that the Board could move on with other cases.

Following discussion, Member Cruz made a motion to grant the employee's request for a CONTINUANCE; that motion DIED FOR LACK OF A SECOND.

Chairman de la O stated that the motion failed and he heard no other motions; therefore, the Board would hear Officer Vernon's case today.

The Board continued (from the meeting of November 3, 2009) with the appeal hearing on behalf of Officer Clive Vernon, regarding his employment termination effective December 1, 2008.

At the November 3, 2009 meeting, the Board approved a motion to begin today's hearing with closing arguments by both attorneys followed by the Board's voting on the charges, discussion and recommendation on the penalty. Chairman de la O reminded all in attendance that while he will chair the hearing, he would not be voting because he did not participate in the hearing from the start.

The attorneys entertained closing argument. Following final argument, the Board entered a motion to find the Appellant, Clive Vernon, GUILTY of all 23 violations cited in the charging document dated November 26, 2008 which are as follows:

1. Departmental Order 1.11.6.13.8 - Conduct Unbecoming

2. Departmental Order 1.11.6.13.20 - Associating with Undesirables
3. Departmental Order 1.11.6.17.7 - Conduct Unbecoming
4. Departmental Order 1.11.6.17.9 - Neglect of Duty
5. Departmental Order 1.11.6.17.14 - Leaving Post
6. Departmental Order 1.11.6.17.16 - Not Properly Patrolling
7. Departmental Order 1.11.6.17.32 - Immorality
8. Departmental Order 1.11.6.18.19 - Worksheets
9. Departmental Order 1.11.6.29.3 - Members to Conform
10. Departmental Order 1.11.6.57.2 - Unauthorized Persons
11. Departmental Order 11.2.3 - Patrol Officer Responsibility
12. Departmental Order 11.2.3.1 - Response to Calls
13. Departmental Order 11.2.3.2 - Advising Dispatcher
14. Departmental Order 11.2.3.3 - Contact with Citizens
15. Departmental Order 11.2.3.3 - Resume Patrol Activities
16. Departmental Order 11.2.3.4 - Leaving Assigned Sector
17. Civil Service Rule 14.2(d) - Willfully Violated Rules
18. Civil Service Rule 14.2(e)(1) - Violated Lawful Order/Insubordination
19. Civil Service Rule 14.2(e)(2) - Breach of Discipline
20. Civil Service Rule 14.2(e)(3) - Loss or Injury to City
21. Civil Service Rule 14.2(h) - Disgraceful Conduct
22. Civil Service Rule 14.2(i) - Offensive Conduct
23. Civil Service Rule 14.2(k) - Incompetent/Negligent

Under discussion, Member Angel-Capo stated that this case being controversial as it has been, she took it upon herself to travel to 79th Street on a Thursday and Saturday night and what she found out was transvestites are normally not out on the streets [between 9-11pm]. She went on to say that the fact that Officer Vernon testified that he took the first two hours of work off and drove (to Miami) to visit his family did not convince her because that would mean that after visiting his family while in plain clothes, he would have had to drive back to Pembroke Pines, shower, dress, and get to work in two hours time. Member Angel-Capo further stated that Officer Vernon's story would have sounded credible if he had gone to visit his relatives in Miami while in uniform and then drove to work (since his place of employment was in Miami.) She stated that Officer Vernon testified that Mr. Murray (victim) waved him down as he drove along 79th Street; however, the question that comes to her mind is if Officer Vernon was in his personal vehicle (as he testified), how would Mr. Murray identify Officer Vernon's vehicle with so many vehicles passing along that street.

Member Cruz stated that there are police officers on the City of Miami police force who have killed people and have cost the City of Miami millions of dollars. He went on to say that Police Chief Timoney drove a Lexus for over a year, which was thievery. Member Cruz further stated that Officer Vernon lives in Miramar so he does not know anyone in Miami, and that the only thing he could find Officer Vernon guilty of was not being smart, but not guilty of violating the departmental orders.

Member Scarola stated that Officer Vernon did make admissions, but the big difference to him was the portion of whether the incident occurred on or off duty. He went on to say that if Officer Vernon were to admit that the incident occurred on duty, he understood that would be an automatic revocation of his police certification from the State of Florida. Member Scarola further stated that there was evidence that this incident occurred earlier in the morning and that he would have loved to hear the complainant in this case testify because he thinks that would have been a great part of the case. He stated that there were things included on Officer Vernon's worksheet that struck him for example, a "will appear" takes approximately 35-40 minutes to complete and when he looked at the "A-Form", which is not a copy of the "will appear", but a copy of an arrest which should have gone straight to the jail. Member Scarola went on to say

that the "will appear" was done after the sergeant signed it which was quite obvious because there was no signature of the defendant in this case. He further stated that he (Scarola) being a police sergeant, he would not have signed the document as a "will appear" arrest because it should not have been one and Officer Vernon knew that also. Member Scarola stated that there were some great time lengths that he is concerned about for example, a signal 3-15 went out that was not heard by Officer Vernon. He went on to say that no one says that an officer cannot take an individual out of their sector, but when it is done a police officer must get on the radio and advise someone, but this was not done. Member Scarola further stated that there was evidence of DNA that gives support to the complainant's statement so he could not vote to find Officer Vernon not guilty of the charges.

Member Cruz stated that he wondered why [the complainant] was not present to testify since she is the main person needed to get to the bottom of things. He went on to say that when Union members take an oath, they are told do no wrong to your members otherwise the union is fictitious. Member Cruz further stated that while unions are necessary, sometimes they are used against the membership.

Chairman de la O asked Member Cruz if he was saying that union members should not vote against Officer Vernon because he is a member of the union. Member Cruz responded in the negative.

Member Angel-Capo stated that she did no wrong rather Officer Vernon did the wrong to himself. She went on to say that there would not have been any DNA evidence had this incident not occurred and that it was Officer Vernon's own admission that this incident took place.

Following discussion, the motion on the floor to find the Appellant GUILTY of all of the charges resulted as follows:

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

Aye: Angel-Capo and Scarola

No: Cruz

Abstain: Chairperson de la O

Absent: Dames

The Board proceeded to the Penalty Portion of Officer Vernon's hearing and the Chairman read Officer Vernon's personnel history into the record which revealed that he was employed on October 3, 2004 and was terminated on December 1, 2008. He went on to say that Officer Vernon's record indicated 0 commendations, 1 Good Citizen Letter, and no reprimands, forfeitures of earned time or suspensions during his tenure with the City of Miami Police Department. He asked Attorney Guttman-Valdes if she had an objection to the personnel report of Officer Vernon's history.

Attorney Guttman-Valdes responded in the negative.

No witnesses testified on behalf of the department relating to the penalty portion of Officer Vernon's appeal hearing.

The Appellant offered no witness testimony, but entered into evidence two reprimands (for another employee) relating to the penalty portion of his appeal hearing.

Following closing arguments by both attorneys, Member Scarola stated that there have

been several termination cases before the Board and he does not think any of the Board members takes these cases lightly, but try to do the proper thing of reviewing each case, give benefit of the doubt when there is doubt, and find the employee guilty or not guilty based on the evidence presented. He went on to say that when it comes to the penalty, especially in termination cases, the Board gives it strict attention and does not take it lightly because persons' livelihoods are involved.

Following discussion, the Board entered a motion to recommend that the City Manager uphold the department director's decision to terminate Officer Clive Vernon's employment which resulted as follows:

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

Aye: Angel-Capo and Scarola

No: Cruz

Abstain: Chairperson de la O

Absent: Dames

H.2

Grievance Hearing on behalf of Dave Condell, Paralegal, alleging a violation of Rule 12 - Layoff, Resignation and Reinstatement.

Prior to hearing Mr. Condell's case, Member Scarola stated that he did not recall the day, but he received a call to his office from an unknown female who wanted to speak to him regarding Mr. Condell's grievance matter. He went on to say that he immediately informed the individual that he could not speak to anyone regarding this case that was going before the Board. Member Scarola further stated that he immediately hung up the telephone and contacted the Executive Secretary to find out if her office had received any calls regarding Mr. Condell's case, to which she replied in the negative. Member Scarola further stated that while no discussion took place, he wanted to have this information included in the record.

The Board entered into the grievance hearing of Dave Condell, the Grievant.

Dave Condell, Paralegal, represented himself.

Barnaby Min, Assistant City Attorney (ACA), represented the Department.

Mr. Condell informed the Board that according to paragraph 28 of his (amended) complaint, he requested relief pursuant to Civil Service Rule 17.1; however, it was not cited for his hearing scheduled today; therefore, he wished to amend his request to include Rule 17.1.

Chairman de la O asked for the department's position regarding Mr. Condell's request to amend his complaint. ACA Min responded that the complaint and grievance was actually amended on October 20, 2009 for which Mr. Condell did file the amended complaint and submitted it to Board Members and staff; however, when the Board addressed his request for a hearing, the Board considered all of the allegations and the amended complaint and granted Mr. Condell a hearing pursuant to Rule 16.2, alleging a violation of Rule 12.

Mr. Condell stated that Counsel for the department did represent in totality the circumstances concerning his amended request.

Chairman de la O asked what is the prejudice in allowing Mr. Condell to proceed under Rule 17. ACA Min responded that the department is prepared for what the Board granted which is a Rule 16.2 hearing alleging a violation of Rule 12.

Chairman de la O stated that ACA Min is ready to proceed concerning layoffs and whether there was a violation and Mr. Condell wants to put forth argument that his layoff was due to some prohibitive purpose on a discriminatory basis.

Member Scarola stated that from what he recalled, the City Attorney laid off the entire group of paralegals in the office so he did not see how it could be a prohibitive act if all of the paralegals were laid off.

ACA Min stated that the department's argument at the time was there was no need to have a hearing pursuant to Rule 17 because all the paralegals were laid off.

Chairman de la O stated that if the entire classification of paralegal was eliminated, he would like Mr. Condell to tell the Board how he was eliminated for discriminatory purposes. Mr. Condell responded that given the number of employees that were laid off, the evidence he is preparing to present establishes what he is asserting.

Chairman de la O asked Mr. Condell to answer his question because he would like to know how one person can say that he was laid off because of age, race, or religion when the entire classification was eliminated. Mr. Condell responded that what he intends to prove is that office-wide beyond his classification (of paralegal) the other employees who were laid off were discriminated against also based on age.

Chairman de la O stated that he was using a hypothetical situation to see if he understood clearly what Mr. Condell is alleging. He asked Mr. Condell if he was saying that for example, in the City Attorney's Office half of the secretaries were laid off, 10% of the lawyers were laid off, and all of the paralegals were laid off and what Mr. Condell intends to prove is that when he looks at all those who were laid off, it looks like the older ones were laid off. Mr. Condell responded that this is the point he wants to prove during the presentation of his case.

Chairman de la O stated that regardless of age, all of the paralegals were laid off so he did not see how Mr. Condell could prove that he was being discriminated against on the basis of age. He went on to say that maybe if all of the paralegals were not laid off, the department may have done (what Mr. Condell has alleged) assuming he could prove his case.

Mr. Condell stated that what he is intending to prove is that the City laid off all of the paralegals to camouflage the particular situation (for which he alleges occurred) by releasing all rather than some of the paralegals to use it as a easy cover to disguise the discrimination.

Chairman de la O asked Mr. Condell if he was saying that the department wanted to lay him off because of his age so it laid off a few younger paralegals to hide the fact that Mr. Condell was being laid off because of his age. Mr. Condell responded in the affirmative.

Chairman de la O stated that he was not sure Mr. Condell's [allegation] would state a claim and asked Special Everett for her position. Special Counsel Everett responded that she just read a similar claim so while his claim might not be impossible, it might be difficult to prove. She went on to say that the question still goes back to whether the department is prepared to address the specific claim of a violation of Rule 17 as alleged by Mr. Condell.

Chairman de la O stated that is the reason he was trying to shortcut the matter because if it does not raise a claim, then there would be no reason to allow the amendment and/or a continuance.

For clarification purposes, Special Counsel Everett asked Mr. Condell if he was making the claim that other employees in the City Attorney's Office were laid off due to their age. Mr. Condell responded in the affirmative. He went on to say that in terms of age, everyone who was laid off was in a protected class with the exception of one employee.

Member Cruz stated that he did not know there was a problem with the legal department (not needing paralegals) because he can recall a year ago that department advertised for paralegals and all of a sudden it no longer needs paralegals.

Chairman de la O stated that according to Mr. Condell's package, he did complain about discrimination in paragraph 29 so he was not convinced that the Board should reject having a hearing on this issue and the minutes do not reflect the Board granting a hearing on this issue so he thinks the Board should take a vote on whether to allow Mr. Condell to [add a violation of] Rule 17.1 and if so, give ACA Min an opportunity to continue the case so he can prepare to defend against that claim. He asked Mr. Condell if he understood that if the Board granted his request to include Rule 17.1 that the Board may very well give ACA Min a continuance so that he can prepare to defend against the allegations. Mr. Condell responded that he would have no objection.

Following discussion, the Board entered a motion to DENY Mr. Condell's request to amend his complaint to include a violation of Rule 17.1 which resulted as follows:

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

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

No: Cruz

Absent: Dames

Following the denial of Mr. Condell's request to amend his complaint to include Rule 17.1, Opening Statements were made by Mr. Condell and ACA Min.

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

1. Grace Carby, Paralegal, City of Miami, Office of the City Attorney.
2. Ramona Gillespie, Litigation Assistant (former Paralegal), City of Miami, Office of the City Attorney.
3. Eddie Fields, former Paralegal, City of Miami, Office of the City Attorney.
4. Cameitra Telfort, Litigation Assistant (former Paralegal), City of Miami, Office of the City Attorney.
5. Angela Roberts, Senior Labor Relations Specialist, City of Miami, Office of Labor Relations.
6. Khadijah Dean-Williams, Law Office Manager, City of Miami, Office of the City Attorney.

The Grievant rested his case.

ACA Min moved for a Motion to Dismiss on the basis that there is a lack of evidence proving a violation of Rule 12.

Chairman de la O explained to Mr. Condell that ACA Min is saying via his Motion that the evidence presented by him (Condell) was insufficient to justify a finding by this Board and that he is asking that the Board render a decision on his Motion to Dismiss. He went on to say that the Board needed to make a motion if they were in agreement with ACA Min's Motion. Chairman de la O further stated that he had not personally heard any testimony that would justify a finding that Rule 12 was violated, in particular because Rule 12 does not address whether a layoff should be done rather it addresses the procedures for conducting a layoff, and there has been no testimony about violation of the procedures for a layoff so he did not believe the Board could give Mr. Condell the relief he was looking for, which ultimately is to get his job back. He stated that he sympathizes with Mr. Condell wanting to get his job back, but he did not see any basis to give him that relief or any reason to continue the hearing and make ACA Min put on a case.

Following discussion, the Board entered a motion to GRANT ACA Min's Motion to Dismiss the grievance hearing on behalf of Dave Condell.

Under discussion, Chairman de la O asked Mr. Condell if he wished to say anything regarding the motion. Mr. Condell responded in the affirmative. He went on to say that he was disappointed that his initial complaint under which he intended to proceed was denied. Mr. Condell further stated that his understanding at the end of his preliminary hearing was that he would be afforded a hearing, which he has had today, to discuss the allegations under the same subheadings unfortunately that was not the case. He stated that the evidence he presented would have proved that the City did not follow its own procedures and rules upon terminating him from employment and there were also a number of other violations detrimental to him. Mr. Condell went on to say that in spite of what happened, he is grateful for the opportunity the Board afforded him and he suspects that given there is no statute of limitations in the Rules relating to Rule 17, he can file a grievance under the same complaint.

Chairman de la O stated that the minutes will reflect that Mr. Condell's hearing was pursuant to Rule 16.2 concerning a violation of Rule 12. He went on to say that he was not present at the meeting (of October 20, 2009) when this matter was discussed, but that is what the minutes indicate.

Member Cruz stated that there was a promotional hiring freeze effective May 7, 2009; however, the freeze has been violated several times because the letter says the City Attorney has the power over the City Manager so he would like to hear from the City Attorney otherwise he cannot make a proper judgment without having all of the facts.

Member Scarola stated that while there is a hiring freeze, there is also a stipulation, which is the City Manager can make exceptions to his decision; which is how the City Manager allowed departments such as Police and Fire to hire essential employees as needed. He went on to say that the Board's decision is not to look at any mismanagement of the Law Department because just like any other City department, the Law Department had the right to select the number of personnel, copier machines, paper, etc. and then it is left up to the elected officials to decide if a department is being mismanaged. Member Scarola further stated that Mr. Condell proceeded under Rule 16.2 concerning a violation of Rule 12; and he thought there would be much evidence presented, but there was none.

Following discussion, the motion on the floor to GRANT ACA Min's Motion to Dismiss

the grievance hearing on behalf of Dave Condell resulted as follows:

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

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

No: Cruz

Absent: Dames

H.3

Grievance Hearing on behalf of Jorge Martinez-Esteve, Project Manager, alleging a violation of Civil Service Rules 1, 8, 12 and/or 14, City Ordinances and the City Charter, regarding his termination.

Chairman de la O asked both attorneys if they were ready to proceed on this case today. Attorney Rind responded that she is ready; however, considering the number of witnesses in the previous case, the Board might not have time to hear Mr. Martinez-Esteve's case. She went on to say that her case probably would not need any witnesses since she did not believe the facts were in dispute thus leaving legal argument only.

Chairman de la O asked opposing counsel if he was in agreement with Attorney Rind's position. ACA Min responded that this is the first he's heard that the employee was not going to call any witnesses. He went on to say that if the employee was not going to call any witnesses, he did not see the need for the department to call witnesses. ACA Min further stated that if this is the case, Mr. Martinez-Esteve's hearing should be completed within an hour.

At approximately 2:16 p.m., Chairman de la O advised that he had to leave and that Member Scarola would chair the meeting until his return at approximately 3:30 p.m.

The Board entered into the scheduled grievance hearing on behalf of Jorge Martinez-Esteve pursuant to Rule 16.2, concerning an alleged violation of Civil Service Rules 1.2, 1.3, 8.13, 12.1 and 14.1.

Osnat K. Rind represented the Grievant, Jorge Martinez-Esteve.

Barnaby Min, Assistant City Attorney (ACA) represented the Department.

Attorney Rind stated that Jorge Martinez-Esteve was employed by the City of Miami as a Project Manager and was laid off September 30, 2009. She went on to say that the City provided to her a list of classifications that shows seniority of employees in the position of the Project Manager job code. Attorney Rind further stated that there is no dispute among the parties that if the Civil Service Rules apply to Mr. Martinez-Esteve's position, then there has been a violation of Rule 12 because there are at least 7 employees with less classification seniority than Mr. Martinez-Esteve has in the classification of Project Manager.

ACA Min stated that the department will stipulate that Mr. Martinez-Esteve's seniority credits were not calculated according to Rule 12 since it was the department's position that he was an unclassified employee and unclassified employees are not subject to Rule 12.

Attorney Rind stated that the Board has before it a legal question which is an

interpretation of the Charter and the Civil Service Rules which she will explain and the only determination the Board would have to make is whether Mr. Martinez-Esteve is a classified employee, and if so, the City violated Rule 12 or he is an unclassified employee, and if so, there is no violation of Rule 12. She went on to say that according to Section 36(c)(1) of the City Charter, it specifies that Civil Service is divided into the unclassified and classified service and it also goes on to list the various positions that comprises the unclassified service. Attorney Rind further stated that the language in Section 36(c)(2) states, "The classified service shall include all positions not specifically included by this Charter in the unclassified service." She stated that the position of Project Manager is not listed in Section 36(c)(1) as being part of the unclassified service so it is by definition part of the classified service. Attorney Rind went on to say that the department will presumably refer the Board to their definitions in the Civil Service Rules and in the City Code, Section 40-61, Definitions; however, there is a definition of classified service that goes beyond the definition of the Charter. She further stated that there is something in the City Code of Ordinance and the Board must remember that the Code of Ordinance are those laws that are passed by the City Commission that are subordinate to the City Charter. Attorney Rind stated that there is the term, "Assistants to Department Heads" that is included in Section 36 that states such positions are to be defined as including five (5) positions in each City department. She went on to say that in essence what the City has done was created five (5) additional positions although it is not provided for in the Charter. She went on to say that if this is the argument the department intends to present, then it has a problem and it is not just because of this argument that she is presenting to the Board, which is expanding the unclassified service is contrary to Section 36 of the Charter, but there is actually a case that was decided by Judge Levinson in Circuit Court which specifically says that the City cannot expand the unclassified service. Attorney Rind went on to say that in 1999 the AFSCME-Union filed a lawsuit against the City of Miami and the protest had to do with promotions. She stated that the Union made the argument that the City was defining certain positions as unclassified, appointing individuals to those positions, and denying [classified/union employees] the opportunity to have a test or to go through a promotional process and as a result, a Motion for Summary Judgment was filed. Attorney Rind further stated that the Order granting the Summary Judgment was signed by Judge Levinson for which he ruled in paragraph #7, that the City was systematically violating the Charter by placing in the unclassified service positions that are not listed in the Charter as unclassified and that the Motion went on to protest in paragraph #7a about the phrase, "Assistant to the Department Head" for which the union's Summary Judgment was granted. She read into the record Judge Levinson's response in support of her argument. Attorney Rind stated that this issue has already been decided by the courts so the City cannot go beyond those specific positions enumerated in Section 36 and add on other unclassified positions; therefore, Mr. Martinez-Esteve by definition is part of the classified service and is entitled to those protections under Rule 12.

Acting Chairman Scarola asked ACA Min for his position. ACA Min responded that Attorney Rind had a fantastic argument and he wished she would have called him ahead of time to discuss this issue. He asked for a recess to make some phone calls on this matter. ACA Min stated that because it might take some time (to get a response), he did not know if the Board and Attorney Rind wished to proceed with the next hearing (Officers Shaffner/McIllwain).

Acting Chairman Scarola stated that the Board would take a 15-minute recess to allow ACA Min time to make his phone calls.

The Board reconvened at 3:11p.m. to hear ACA Min's response to Attorney Rind's argument.

ACA Min stated that in response to Attorney Rind's argument, he would ask that this

matter be continued or in the alternative, defer discussion of this matter to the end of the agenda so that he could continue working on this issue and perhaps move on to the other cases.

Member Angel-Capo asked ACA Min if it was agreed to do as he suggested, would the Board have an answer by the end of today. ACA Min responded that he would try to have a proper response for the Board by the end of today, but obviously he did not want to make any false promises.

Acting Chairman Scarola advised that the Board was tabling discussion on Mr. Martinez-Esteve's case until later this afternoon and in the interim, proceed with the next two scheduled cases.

The Board reconvened at 5:02 p.m. to obtain the department's response.

ACA Min informed the Board that he would once again ask for a continuance to respond to the allegations and argument made by opposing counsel. He went on to say that this is the first time the hearing was scheduled; it is not the same argument that was made when the hearing was initially requested, opposing counsel never informed the department that this would be the argument that she would be making, so the department is not prepared to go forward and respond to the arguments that were made. ACA Min further stated that for the past two hours, they had been attempting to contact the City Manager who is in a meeting with the County Manager and other members of the administration to resolve the matter, but no one was available.

Attorney Rind stated that she opposed the continuance requested by the department and that this is exactly the argument she said she would make at the last meeting. She went on to say there was no reason to make Mr. Martinez-Esteve wait two weeks for some form of ruling from the bench and wait another two weeks before it is reduced to writing.

Following discussion, the Board entered a motion to DENY the department's request for a continuance which resulted as follows:

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

Aye: Angel-Capo, Scarola and Cruz

Absent: Chairperson de la O and Dames

Following the Board's motion to deny the department's request, the Board entered a motion to reinstate Mr. Jorge Martinez-Esteve with back pay which resulted as follows:

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

Aye: Angel-Capo, Scarola and Cruz

Absent: Chairperson de la O and Dames

H.4

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

The Board entered into the hearings of Officers Barbara Shaffner (Item H.4) and Kenneth McIlwain (Item H.5) as both attorneys agreed to consolidate these cases.

Barnaby Min, Assistant City Attorney, represented the Department.

Osnat K. Rind, Attorney, represented the Appellants (Barbara Shaffner/Kenneth McIlwain).

ACA Min made opening statements.

Attorney Rind deferred opening statements and advised that her client Kenneth McIlwain would be appearing via telephone.

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

- 1. Jeffrey Locke, Police Lieutenant, City of Miami, Department of Police.*

During Attorney Rind's cross examination of the department's witness, the Chairman arrived at 3:40 p.m. At 4:12 p.m. Member Angel-Capo reminded the Board that they needed to revisit Mr. Martinez-Esteve's case to hear the department's position. Acting Chairman Scarola brought Chairman de la O up to speed as to the status of the cases and handed the gavel back to the Chairman.

Chairman de la O asked ACA Min if he needed a minute to find out what was going on with the department's response (in the matter concerning Jorge Martinez-Esteve). ACA Min responded in the affirmative. He went on to say that since they were in the middle of Lt. Locke's testimony he would prefer to continue with his testimony.

The Board took a recess at 4:58 p.m., the gavel was passed back to Member Scarola to Chair the meeting since Chairman de la O had to leave. Following the recess, Member Scarola stated that the Board would have to continue the hearings of Officers Shaffner and McIlwain for two weeks because there was not sufficient time to complete the hearing. He went on to say that he would ask that the department's witness do not speak to ACA Min since he is in the middle of cross-examination and that he would also ask that all refrain from talking about the case until it has been resolved in two weeks. Acting Chairman Scarola further stated that the meeting scheduled for December 1, 2009 will begin at 9:00 a.m.

The Board entered a motion to CONTINUE the hearings of Officers Barbara Shaffner and Kenneth McIlwain and charge the continuance to the Board due insufficient time to finish the cases which resulted as follows:

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

Aye: Angel-Capo, Scarola and Cruz

Absent: Chairperson de la O and Dames

H.5

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

Following testimony of the first witness, the Board entered a motion to CONTINUE the hearing of Kenneth McIlwain and the charge the continuance to the Board (See Item H.4 for details). The motion resulted as follows:

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

Aye: Angel-Capo, Scarola and Cruz

Absent: Chairperson de la O and Dames

H.6

Hearing of appeal on behalf of Victor Cornier, Materials Specialist Supervisor, relative to his 1-Day Suspension, effective February 27, 2009.

Chairman de la O stated that based on the number of hearings scheduled today, the Board would not have time to hear Mr. Cornier's hearing. He went on to say that he would prefer to charge a Board continuance now rather than have the witnesses waiting.

Following discussion, the Board entered a motion to CONTINUE Mr. Victor Cornier's hearing and charge the continuance to the Board 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

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: Angel-Capo, Scarola and Cruz

Absent: Chairperson de la O and Dames

The meeting adjourned at 5:07 p.m. Breaks were taken at 10:47-11:02 a.m.; 12:06-12:22 p.m.; 12:46-:27 p.m. (Lunch); 2:17-2:36 p.m; 2:47-3:11 p.m. and 4:14-5:00 p.m.

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary