

City of Miami

*City Hall
3500 Pan American Drive
Miami, FL 33133
www.miamigov.com*



Meeting Minutes

Tuesday, December 9, 2008

9:00 AM

Special Meeting

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 9:17 A.M. The roll call for Board Members at the commencement of the meeting was as follows:

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

- A. APPROVING THE MINUTES OF:**
- B. PERSONNEL MATTERS**
- C. MILITARY LEAVES OF ABSENCE**
- D. DISCIPLINARY MATTERS**
- E. GENERAL ITEMS**
- F. REPORTS**
- G. REQUESTS FOR HEARINGS**
- H. TODAY'S HEARINGS**

- H.1** Hearing of appeal on behalf of Lazaro Chappoten, Automotive Mechanic, relative to his termination, effective May 30, 2008.

The Board entered into the scheduled hearing of Lazaro Chappoten and upon doing so, Attorney Irizarri submitted to the Board that there was a conflict with one of the Board Members and moved for the recusal of Board Member Jessica Angel-Capo from these proceedings. He went on to say that according to the last page of the reprimand, Mr. Chappoten alleged under allegation #9 that he was harassed by Charlie Cox, President of AFSCME-Local 1907 (the union) so he does not think Member Angel-Capo could render a fair and impartial decision since she was appointed by the union. Attorney Irizarri further stated that he noticed Mr. Cox exit the room when the rule of witnesses was invoked so he could only presume that Mr. Cox would be testifying since he does not receive a list of the department's witnesses.

Chairman de la O stated that the decision of whether Member Angel-Capo should be recused is for her to make based on the conflict of interest ordinances, but he believes Attorney Irizarri was factually wrong on the point that she was appointed because she was not appointed, but elected by the union.

For clarification purposes, Member Angel-Capo stated that she was not elected by the union, but elected by City employees.

Attorney Irizarri stated that the matter still stands that Mr. Cox is the president of the union, he is going to be a witness, and there has been a history of conflict between Mr. Chappoten and the union.

Chairman de la O stated that he did not think it was a motion, but he could request that Member Angel-Capo recuse herself and she would make her own decision. He suggested that Member Angel-Capo consult with Special Counsel Everett and if she decides to recuse herself, she could. Chairman de la O further stated that as he

understands the Conflict Rules, it is whether a person has an interest and it is a more substantive interest than whether you know people involved in the case.

Attorney Irizarri responded that he submits that Member Angel-Capo does have an interest she is beholding to the union and on that basis, he requests that she recuse herself from these proceedings.

Chairman de la O asked Member Angel-Capo if she wished to make the decision of recusing herself at this time.

Member Angel-Capo responded in the negative.

Chairman de la O stated that Member Angel-Capo will speak with Special Counsel Everett when she arrives. He went on to say that Member Angel-Capo could recuse herself at any point prior to the voting if she feels that Attorney Irizarri's request is well taken. Chairman de la O asked Attorney Irizarri if he had any other motions and he responded in the negative.

Assistant City Attorney Vizcaino that the department is not in agreement with Attorney Irizarri's position that Member Angel-Capo's sitting for these proceedings would cause a conflict of interest.

Following discussion, the Board proceeded with the hearing.

Diana Vizcaino, Assistant City Attorney, represented the Department.

Ramon Irizarri, Attorney, represented the Appellant.

The Rule of Witnesses was invoked and all witnesses were sworn in individually.

Both attorneys made opening statements.

Witnesses for the Department appeared in the following order:

- 1. Charlie Cox, Line Worker Supervisor/President, AFSCME Union-Local 1907.*
- 2. Kelly Barket, Director, City of Miami, Department of General Services Administration.*

Questions were posed by Board Members de la O, Cruz, and Dames during the testimony of witness Kelly Barket.

Tomas Regalado, Commissioner, City of Miami, was called out of turn to provide testimony on behalf of the Appellant.

Questions were posed by Board Member Scarola during the testimony of witness Tomas Regalado.

The Department continued with the calling of its witnesses.

- 3. Elsa Jaramillo-Velez, Deputy Director, City of Miami, Department of Employee Relations.*

Questions were posed by Chairman de la O during the testimony of witness Elsa Jaramillo-Velez.

The Department rested its case.

Chairman de la O stated that he wanted to have a discussion because he felt at this point, that the department had proven its case. He went on to say that it all stems from the fact that he did not take Mr. Chappoten's comments to Mr. Barket as a threat or certainly not an undue threat when he reads them in the context that Ms. Lourdes Lopez explained them. Chairman de la O further stated that the comments sounded at worse more like a threat of litigation, which for better or for worse, we have as citizens that right to litigate so he left thinking if there was some violation of City rules, is there sufficient basis for the Board to uphold Mr. Chappoten's termination or a lesser punishment. He stated that the discussion he would like to have is if any Board Member felt the City met its burden, then obviously the Board should make the Appellant put on his case, but if the Board agrees that the City did not meet its burden, there is no reason to continue with this hearing.

Assistant City Attorney Vizcaino stated that in response to [Chairman de la O's comments], she would submit that Deputy Director Jaramillo-Velez under redirect stated that Mr. Chappoten's termination was based on a totality of the circumstances and she believes the Chairman's question was: Is there an issue of being time-barred to issue a discipline and the response was there is nothing that bars a director or Employee Relations from giving a discipline, reprimand, or any action after a particular offense had occurred. She went on to say that there were numerous allegations starting from 2000, but she would begin with 2006 because there were many instances for which Mr. Chappoten was not disciplined in writing. Assistant City Attorney Vizcaino further stated that Mr. Chappoten was giving many verbal counsellings, written reprimands, but aside from that there are numerous allegations and his behavior ranging from 2006 to 2007 that had nothing to do with Ms. Jaramillo-Velez' investigative report addressing nine allegations. She stated that the Board heard testimony from the Department Director about Mr. Chappoten's repeated disruptive behavior and his being advised of Civil Service Rule 14.2(r) that refers to antagonizing superiors, criticizing orders, rules and procedures time and again.

Chairman de la O suggested that in fairness to the City, the Board take a five minute recess to allow the City time to find the three worst e-mails that Mr. Chappoten had not been disciplined on and shows a violation of the City's rules because the generic testimony that Mr. Chappoten had been warned was not going to cut it. He went on to say that he needed to see the e-mails and then the Board could discuss whether there was a violation.

Assistant City Attorney Vizcaino stated that she had an entire box of relevant documents and e-mails that she did not copy for the purpose of speeding this hearing along.

Chairman de la O responded that the City rested its case so he is asking the City to pull out the worst three e-mails that are in evidence that Mr. Chappoten has not been disciplined for and the Board could then have discussion as to whether those e-mails rise to the level of a violation. He went on to say that with regards to the threat, he did not see it as being a threat, but he guess it is in the ear of the listener, but he did not take it as a threat when he read it in context. Chairman de la O further stated that when he read it in the disciplinary letter, he took it as a threat, but after reading Lourdes Lopez' memo, he did not see it as a threat. He went on to say that he wants to think about the matter [of the City not proving its case] some more, consider the three worst things Mr. Chappoten has done that he was not disciplined for, and while the City is checking the e-mails to keep in mind that the incidents had to have happened in a reasonable time as stated by Deputy Director Jaramillo-Velez. Chairman de la O further stated that if the City uses e-mails going back to 2000, he thinks the City would have a difficult time [convincing him], but if the incidents were during the time of the investigation, he probably would be more empathetic.

Following the recess, Chairman de la O asked the City's attorney to share with the Board her findings.

Assistant City Attorney Vizcaino responded that she pulled out numerous e-mails and there were many more that she wished to review if the Board was willing to provide a recess since the Board probably would not finish this case today.

Chairman de la O asked Assistant City Attorney Vizcaino to state for the record where these e-mails could be found and she responded that the e-mails were not included in the Board's packets.

Chairman de la O asked if the e-mails were included in the record.

Assistant City Attorney Vizcaino responded that they were in the record as far as e-mails that were in existence from 2006 to May 2008 on so many different allegations that the Employee Relations Department did not investigate in its report. She went on to say that she was referring to e-mails from February 2007 of which Mr. Chappoten complained about OSHA regulations, compressed air, garden blowers, etc.

Chairman de la O reminded Assistant City Attorney Vizcaino that he wanted to consider e-mails that were in the record and the one she just read was not included in the record because she had already rested her case. He asked Assistant City Attorney Vizcaino again to look into the record and share with the Board an e-mail that she would consider a violation other than the threat that Mr. Chappoten was not disciplined for and that the Board should see as a basis for him to be disciplined May 2008.

Assistant City Attorney Vizcaino responded that they were headed in a different direction. She went on to say that they looked at e-mails that were not introduced into evidence and as she mentioned earlier she has a box of documents that she was not going to make for the Board to review today.

Chairman de la O stated that what he assumed was that the City gave the Board e-mails that contained the worst incidents.

Assistant City Attorney Vizcaino responded that she did not provide the worst e-mails, but there was different stuff.

Chairman de la O asked for the other Board Members' view on whether the Board should proceed with hearing from the Appellant's witnesses or whether the Board has proven its case in that there was a threat made against the Department Director.

Member Cruz stated that the City has zero tolerance in the workplace with regards to violence and harassment. He went on to say that in his place of employment if employees have an argument, they are taken off of the clock, an investigation takes place, and then the employees are required to go to counselling.

Member Dames stated that the Department Director [Barket] did not feel that a threat was made against him because he testified that the other persons in the room brought to his attention that Mr. Chappoten threatened him and at that time he agreed with them. He went on to say that he read Assistant Director Lourdes Lopez' notes and he did not get the impression from her written comments that Mr. Chappoten was threatening the Department Director. Member Dames further stated that from May 13, 2008 to May 30, 2008 he did not see anything egregious that Mr. Chappoten did that would warrant his termination from employment.

Member Angel-Capo stated that the Department Director testified that he did not feel threatened until someone else from the meeting told him that Mr. Chappoten threatened him.

Member Scarola stated that while the Department Director did not immediately feel that a threat was made against him, it could have been an afterthought. He went on to say that he was sort of torn and he was aware that the City rested, but to make a motion either way based on what he heard so far, is going to be a little difficult to move forward with and he did not know if the City could come back later and offer other testimony.

Chairman de la O stated that it is the City's burden before it rests to put on testimony in order to make the Board feel like there was a violation of the City Charter.

Assistant City Attorney Vizcaino asked to be heard before the Board voted on this matter. She went on to say that the rules that were being referred to in the termination letter did not say anything about an actual threat. Assistant City Attorney Vizcaino further stated that whether the Board heard that Mr. Barket felt threatened or not, that is not what the rules of this Board state. She read into the record the three rules that were cited in the termination letter and stated that the Board heard testimony with regards to the rule violations. Assistant City Attorney Vizcaino stated that she understood that the Board concern was happened from May 13, 2008 to May 30, 2008 [that would have resulted in Mr. Chappoten's termination]. She went on to say that she focused on actions from 2006 to May 2008 and there is no rule that says a department director or Employee Relations for that matter must take immediate action. Assistant City Attorney Vizcaino further stated that she was not talking about reprimands, letters, or allegations that were raised by Mr. Chappoten in 2000, but she was keeping her presentation within the time frame of 2006-2008 of allegations that were not investigated by Employee Relations in the March 2008 report.

Assistant City Attorney Vizcaino stated that with regards to violations of Civil Service Rule 14.2(i) and 14.2(r), she could say that all of the testimony the Board heard today dealt with Mr. Chappoten criticizing the policy, City, GSA, and everybody in administration on how they are all corrupt. She went on to say that if some of the Board Members are concerned with the actual decision to terminate, that would go to the phase two [penalty portion], but right now the Board was considering the actual rules that were referred to in the termination letter. Assistant City Attorney Vizcaino further stated that the rules Mr. Chappoten had been advised of and that he in fact was in violation of them, he continued to violate the rules.

Chairman de la O stated that the problem he sees is that Assistant City Attorney Vizcaino was right when she said there was no definitive time limit, but it must be within a reasonable period. He went on to say that Mr. Chappoten wrote an e-mail on April 29 and on May 7 or 8, he was immediately reprimanded and although it may have been done a little later, it was done timely. Chairman de la O further stated that the Board is now being told that other things may have happened since, but no evidence was presented that Mr. Chappoten did anything since that time and now the City wants to skip back and say it does know which of the e-mails would qualify for termination and now say that it was going to fire him the e-mails even though he was reprimanded on May 13, 2008 and told him not to do it again.

Assistant City Attorney Vizcaino stated the distinguishing factor as to the Chairman's concern is that the May 13, 2008 e-mail dealt with the three-mails from the end of April to the beginning of May. She went on to say that the Employee Relations' investigation stemmed from allegations from 2006 and as Ms. Jaramillo-Velez stated, she took various things into consideration during her investigation of the 9 allegations and as she was conducting the investigation she instructed the GSA Director to cease making any

investigations or taking any actions against Mr. Chappoten because her department was handling this matter. Assistant City Attorney Vizcaino further stated that the e-mails and the allegations that Department Director Barket testified to and what she guess the Board is going to hear on cross or direct examination from Attorney Irizarri's witnesses is that they are going to testify to the same things which were the numerous e-mails and [Mr. Chappoten's] pattern of behavior from 2006 until after the Employee Relations Department completed its investigation.

Chairman de la O stated that there is something about due process that bothers him. He went on to say that the Board heard Ms. Jaramillo-Velez testify that they were not going to punish Mr. Chappoten for the investigation she completed of the nine allegations.

Assistant City Attorney Vizcaino responded that Mr. Chappoten made admissions to gay bashing, using profanity, and as Ms. Jaramillo-Velez stated, there would not be discipline for those particular allegations, but what about all the other allegations that Mr. Chappoten made in 2006, 2007, and the beginning of 2008 that were not addressed in the Employee Relations investigation. She went on to say she would ask if it is okay for Mr. Chappoten to continue in his way although he had been advised repeatedly by administration that he had to follow proper procedures and policies.

Chairman de la O asked what was the allegation and what did Mr. Chappoten say other than what the City presented.

Assistant City Attorney Vizcaino responded that he criticized the administration and its policy for which are addressed in the Civil Service Rules.

Member Dames stated that as he listened to the City, it appeared to him that they were saying that if an employee brings about allegations that employee would be punished.

Assistant City Attorney Vizcaino stated that she did not take Member Dames' comment personally but she would ask the Board to recall Commissioner Regalado's comment earlier when he said a person need facts when they are making an allegation and he was very clear on the record when made mention of this fact. She went on to say that the testimony the Board has heard from every witness that took the stand under oath was fact. Assistant City Attorney Vizcaino further stated that not one fact that Mr. Chappoten provided as to allegations he had been raising since the year 2000 when he first became employed by the City.

Member Dames begged to differ with Assistant City Attorney Vizcaino because of the nine allegations that were investigated, he felt that four were substantiated whereas the other five were not.

Chairman de la O stated that it is a fine line because the Board wants to encourage employees to complain if things are wrong but not to complain frivolously and maliciously. He went on to say that it is a fine line and there is no easy way to draw it.

Following discussion, the Board entered a motion to find the Appellant NOT GUILTY of all the charges based upon the City's failure to prove its case, which resulted as follows:

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

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

No: Chief Examiner Scarola

ADJOURNMENT:

The Chairman called for a motion to ADJOURN.

Motion by Member Cruz, seconded by Member Dames, to APPROVE. PASSED unanimously.

The meeting adjourned at 4:40 PM. Breaks were taken at 10:51-11:08 a.m., 12:11-12:14 p.m., 1:20-2:31 p.m. (LUNCH) and 4:07-4:24 p.m.

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary