

City of Miami

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



Meeting Minutes

Tuesday, December 15, 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
Michael T. Dames, Board Member*

PLEDGE OF ALLEGIANCE

The meeting was called to order at 10:18 a.m. The roll call at the commencement of the meeting was as follows:

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

Absent: Member Angel-Capo

Vacant: Member **Vacancy

NOTE: Member Angel-Capo arrived at approximately 10:28 a.m. and a second roll call took place. The second roll call identified all members as being present.

A. APPROVING THE MINUTES OF:

Regular Meeting of December 1, 2009.

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

Aye: Chairperson de la O, Dames and Scarola

Absent: Angel-Capo

Vacant: **Vacancy

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

- C.1** Vincent F. Miller, Police Officer, requests retroactive re-employment as a Police Officer following his return from military leave. (DISCUSSION)

ITEM ADDITION

The Executive Secretary stated that this item was addressed yesterday so there was nothing for the Board to consider regarding this matter.

WITHDRAWN

- C.2** Robert A. Perez, Police Officer requests active duty military leave without pay from January 2, 2010 through April 2, 2011. Copies of Orders submitted. (DISCUSSION)

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

Aye: Chairperson de la O, Dames and Scarola

Absent: Angel-Capo

Vacant: **Vacancy

- C.3** Ramon R. Odio, Police Officer requests active duty military leave without pay from January 2, 2010 through January 2, 2011. Copies of Orders submitted. (DISCUSSION)

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

Aye: Chairperson de la O, Dames and Scarola

Absent: Angel-Capo

Vacant: **Vacancy

C.4

Marc Redondo, Police Officer, requests active duty military leave without pay from December 3, 2009 through January 6, 2011. Copy of Orders submitted. (DISCUSSION)

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

Aye: Chairperson de la O, Dames and Scarola

Absent: Angel-Capo

Vacant: **Vacancy

D. DISCIPLINARY MATTERS

D.1

Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Katly Guerrier, Police Officer, of her 10-hour suspension, effective December 11, 2009. (NOTIFICATION)

NOTIFIED

D.2

Copy of a letter from Kelly Barkett, Jr., Director, Department of General Services Administration, notifying Javier Olivera, HVACR Supervisor, of his 1 day suspension, effective November 20, 2009. (NOTIFICATION)

NOTIFIED

E. GENERAL ITEMS

E.1

Notice of withdrawal from Nicolas A. Manzini, Attorney, on behalf of his client, Roy Brown, Police Major, regarding his request for Whistleblower hearing. (NOTIFICATION)
Request will be withdrawn and removed from the Board's docket.

WITHDRAWN

E.2

Notice of a Request to Continue from Osnat K. Rind, Attorney, on behalf Shekita Johnson, Communications Operator, relative to her 8-hour suspension, effective February 8, 2009. Barnaby Min, Assistant City Attorney, expressed no objection to the continuance. (DISCUSSION)

Hearing of appeal is scheduled for today.

Chairman de la O asked Assistant City Attorney (ACA) Min if he had an objection to the employee's request for a continuance. ACA Min responded in the negative.

Member Dames asked for the employee's reason for requesting a continuance. Attorney Rind on behalf of Shekita Johnson responded that she requested the continuance because she has another case scheduled for today that she thinks will take most of the day to complete, there are two other cases scheduled, and she needs more time to prepare the case.

Following discussion, the Board entered a motion to APPROVE the employee's request for a continuance 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, Dames and Scarola

Absent: Angel-Capo

Vacant: **Vacancy

E.3

Copy of a "Motion for Partial Summary Judgment" filed by Barnaby Min, Assistant City Attorney, on behalf of the City of Miami, concerning the hearing of appeal on behalf of Fignole P. Lubin, Police Officer. (DISCUSSION)

Chairman de la O stated that he reviewed the department's Motion for Partial Summary Judgment and asked ACA Min if there was anything else he wished to tell the Board that was not included in the Motion. ACA Min responded that the reason he submitted the Motion is because the hearing is scheduled in June 2010, but if the Board grants his Motion, the discipline portion of Officer Lubin's hearing could be set for the Board's January 12, 2010 meeting since it should take approximately 10 minutes to complete as opposed to one day.

Chairman de la O asked for opposing counsel's position on the department's Motion. Attorney Rind responded that she opposed the Motion. She went on to say that even assuming [the department could ask that the Board go directly to the penalty phase of Officer Lubin's hearing] she was not sure if the Board could do so under its Rules because she thinks the employee is entitled to a (full) hearing. Attorney Rind further stated that of course there could be a general agreement as to the facts but not a total disagreement about whether there is a violation of any departmental rule or order. Attorney Rind further stated that their position is there was no violation.

Chairman de la O stated that he recalled a prior case where the employee admitted to doing something wrong and the Board found him not guilty because although he agreed with the facts, the Board decided that those facts did not amount to a violation of the Rules. ACA Min responded that would be an illegal conclusion. He went on to say that if the facts included in the written reprimand are not in dispute and the Board finds that the facts are a violation of departmental orders, the Partial Summary Judgment should be granted and the Board moves to phase 2 (penalty portion) of the hearing. ACA Min further stated that if the Board thinks that the facts as stipulated are a violation of departmental orders, the Motion should be denied, the employee be given a full hearing, and both attorneys could present argument as to why the department feels the Rules were violated.

Chairman de la O stated that Attorney Rind is saying that her client does not agree that the Rules were violated even though they agree to the facts as they have been set out (in the reprimand). He went on to say that in order for the Board to grant the department's Motion, there needs to be at least a hearing on what those facts mean. ACA Min responded that he respectfully disagreed. He went on to say that if the facts

are not in dispute, then the sole issue is as a matter of law, the Board's responsibility to determine whether those facts are a violation of the Rules. ACA Min further stated that would be a legal conclusion and not a factual conclusion.

Chairman de la O stated that he needed to hear from Attorney Rind and her client on this issue because they can agree to the facts and not agree to the conclusion of law. ACA Min responded that the employee's attorney could make that argument without having a hearing. He went on to say that there was no need for a factual hearing, but a legal hearing that could be done today. Chairman de la O responded that assuming Attorney Rind is ready, it could be done today.

Attorney Rind stated that her client's hearing is not scheduled for today. She went on to say that obviously there are a lot more facts that come out before the Board than are set forth in a reprimand. Attorney Rind further stated that their position is exactly what the Chairman mentioned which is a full hearing to hear the totality of the facts in order to reach a conclusion one way or the other.

ACA Min stated that he was not sure what the assertion is (when Attorney Rind indicated) that this matter was not scheduled for today when his Motion was sent out two weeks ago and was placed on today's agenda. Attorney Rind stated that she was saying that the hearing was not scheduled for today.

Chairman de la O stated that the Motion for Partial Summary Judgment was set for today.

ACA Min stated that if the facts are not in dispute, they could now move to legal argument as far as why the facts that are not in dispute are therefore a violation or not a violation of the rules. Chairman de la O responded that in order to do (what the department's attorney is suggesting), he needs to hear the differences as opposed to a Civil case where there have been a number of depositions taken and the Board has a full factual record, but the only thing the Board has is a summary of the facts as set forth by the department. He went on to say that the Board is not set up to have a full summary judgment.

ACA Min stated that a full summary judgment is not in dispute because Officer Lubin does not have to agree with the summary that is presented to the Board. Chairman de la O responded that did not mean those were the only facts that Officer Lubin agrees to, but there maybe other facts that Officer Lubin agrees to that the department may or may not agree with. ACA Min responded that he respectfully disagreed (with the Chairman) especially if a person were to read all of the attachments for which Officer Lubin makes it very clear that the only portion that he is disputing is the discipline.

Chairman de la O stated that what he heard Attorney Rind say is not that she disagrees with any of the facts that are set out, but there are other facts that her client wants to bring out. ACA Min responded that Officer Lubin put in writing that he accidentally discharged his weapon and was only contesting the penalty, so it is the Board's responsibility to determine the appropriate penalty for accidentally discharging a weapon when the proper procedure is not followed.

Chairman de la O stated that as suggested by ACA Min, this could be done at the hearing because he did not see why the Board needed to wait until June especially when it seems like the factual portion of the hearing would be short. ACA Min responded that he had no problem waiting until June, but the issue is if the Board wants to have a factual presentation delivered to them, witnesses would have to be presented to give testimony and he is trying to cut the hearing down to what the actual issue is before the Board. He stated that the department's only issue is what the discipline is

because Officer Lubin indicated (in writing) that he disagreed with the penalty and not that he disagreed with what happened. ACA Min went on to say that he thinks all will agree with the facts that Officer Lubin was chasing a guy, he failed to holster his gun and it discharged. He further stated that these are the actual facts so the Board can go directly to phase 2 of the hearing since nothing different is going to come in at the factual hearing.

Chairman de la O asked Attorney Rind if she disagreed with any of the facts mentioned by ACA Min. Attorney Rind responded in the negative. She went on to say that the Board would have to hear the story to see how it concluded in order to determine whether there was a violation of the departmental orders. Attorney Rind further stated that it is not accurate to say that he has agreed there has been a violation and only disagrees with the level of penalty. She stated that they disagree that the events that occurred that day violated any departmental order, rule or regulation that is cited in the reprimand.

Chairman de la O asked Attorney Rind what should the Board do with the fact that Officer Lubin wrote (on his Request For Hearing form), "...as a result I am requesting a hearing regarding the set penalty." Attorney Rind responded that she did not think that her client meant that he violated any departmental orders. She went on to say that Officer Lubin could disagree with the penalty because he felt he did not violate a departmental order. Attorney Rind further stated there was absolutely nothing in what Officer Lubin wrote that says he agrees that he was in violation of any departmental orders rather he only said that he only agrees with the facts of the reprimand.

Chairman de la O stated that he was sympathetic to the department not wanting to prove the facts if they do not need to. He suggested that the matter be handled like a Motion for Partial Summary Judgment for which Attorney Rind would include the facts she believes are disputed or want to prove and ACA Min could respond as to whether he disagrees or not, and then the Board could have a hearing as to whether there was a violation of the Rules to determine whether there is a need for a hearing or not.

Attorney Rind stated that she did not understand what the Chairman was saying to her. She asked the Chairman if he was asking her to proffer testimony before the hearing. Chairman de la O responded in the affirmative.

Attorney Rind responded if that is what the Chairman is requiring that she do, she has no choice but to comply, but she totally disagrees with the Chairman's suggestion. She went on to say that her client has requested a hearing before the Board, but it is not her obligation to prepare the department on what its defense or argument is going to be. Chairman de la O responded that he is asking Attorney Rind to respond to the Motion for Partial Summary Judgment to see if there are any factual disputes that require a hearing on a violation.

Attorney Rind stated that she would suggest to the Chairman that at the hearing if the department wants to rely on the document and the reprimand, it can do that and she can bring in Officer Lubin for testimony of what occurred on that day. Chairman de la O responded that he thinks Attorney Rind's response should be that they agree with the following facts and that would address the department's concerns. He went on to say he does not think the Board should have to listen to these agreed upon facts and it sounds to him that the Board would not have to, but certainly he could see where the department does not want to sit back and rely on this to try to impeach Officer Lubin because they have a right to move for summary judgment supposedly if there is no dispute on the facts.

Attorney Rind stated that there are other disputes. Chairman de la O responded that the

Board needs to figure out what those disputes are so that the Board has a hearing only on those disputed items. He went on to say that whether Attorney Rind agrees or disagrees with all of the facts is great, but he needs her to provide a written response so that the Board could narrow down the hearing as much as possible to avoid having to hear unnecessary testimony.

Attorney Rind asked if the Board is prepared to say that the facts by themselves equate to a violation of departmental orders based on what is written in the reprimand. Chairman de la O responded that he did not know because he had not heard argument yet as to Attorney Rind telling the Board that there are other facts, otherwise the Board could have a hearing on whether the rules were violated; but this cannot be done until he knows exactly whether Attorney Rind is disagreeing to any facts or what other additional facts she wants to bring up. He went on to say that if Attorney Rind brings up additional facts, then ACA Min has to tell the Board whether he agrees or disagrees with those facts and then the Board can make a ruling as to whether the rules were violated. Chairman de la O stated that the way Officer Lubin's written statement reads, he agrees with all of the facts, but Attorney Rind is telling the Board there are additional facts, so she needs to bring those facts forward so the Board knows how to rule on the department's summary judgment.

Attorney Rind stated so that she is clear, the Board is asking her to put in facts and not legal argument. Chairman de la O responded that the legal argument is going to follow the facts. He went on to say that Attorney Rind could respond to a legal argument, but she does not have to, but he thinks she should start with the facts so that they work on the same operative facts as to what occurred in Officer Lubin's case.

Attorney Rind asked what the difference was between what the Chairman explained and coming to a hearing, putting in a document and having her client testify about what occurred. Chairman de la O responded that in his opinion, the difference in this case is Officer Lubin appears to agree with the facts as laid out by the department (in the reprimand) and Attorney Rind has said that the Board cannot rule on this matter today because there are other facts that Officer Lubin wants the Board to consider in determining whether he violated the rules, so the Board needs to know what those other facts are.

Attorney Rind stated that the facts that are laid out in the reprimand do not amount to a violation.

Following Member Angel-Capo's arrival, a second roll call took place, which resulted as follows:

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

The Board continued with discussion of the department's Motion for Partial Summary Judgment.

Chairman de la O stated that if Attorney Rind is telling the Board that there are no other facts to consider, then he would suggest having legal argument as to whether this amounts to a violation or not. He went on to say that Attorney Rind may be right that it does not amount to a violation, but he has no idea because the Board has not heard legal arguments on this matter. Chairman de la O further stated that Attorney Rind continues to tell him that there are other facts so he is giving her a chance to put this into the record.

Attorney Rind stated that if the Board requires her to (proffer testimony before the hearing), she will do what is asked of her although she objects to doing so. She went on to say that her client has a date set for the hearing, he is entitled to have that hearing, and the Board's obligation is to hear those facts at that hearing, which is the way she would like to proceed; however, she will proceed as the Board directs her to.

Chairman de la O stated that Attorney Rind can accept the facts, reverse the facts or put in additional facts and at that point ACA Min will review the facts. He went on to say that if there is a dispute to any of the facts, then there is no basis for a summary judgment.

ACA Min stated that he was somewhat confused that the Motion is scheduled for today but is not prepared to go forward today. He went on to say that if Attorney Rind had a position that the facts were in dispute, she should have filed a response. Chairman de la O responded that the Board does not have discovery or a process for pretrial motions.

ACA Min stated that the last thing he wants to do is waste the Board's time so he would not have scheduled a Motion on today's agenda if it was not going to get addressed.

Chairman de la O stated that he has given both attorneys directions on how to proceed. He went on to say that he needs a motion to require the employee's attorney to file any facts that she wants considered otherwise the Board would have to rule on the department's Motion for Partial Summary Judgment. Hearing none, Chairman de la O stated that there is a Motion that the department filed and several ways the Board can proceed which are: the Board can rule on the Motion today and hear legal arguments, but what he understood from Attorney Rind, there are other facts that will play into whether there was a violation of the Rules or not so what he is suggesting is that the employee provide those additional facts to see if the department disagrees. He went on to say that if everyone agrees to what the facts are, then the Board could make a ruling as to whether the rules were violated or not and at that point the Board could rule in favor of the employee and say that the rules had not been violated and there would be no need for a hearing in June if legally it does not amount to a violation of the Rules.

ACA Min stated that he disagreed with the Chairman's last statement unless there is a cross-motion for a Partial Summary Judgment. Chairman de la O responded that he agreed with ACA Min but he assumed Attorney Rind was going to do that to the point where she files a response to ACA Min's Motion but he could only assume that if she does not believe there is a legal violation, she is going to file a cross motion.

Attorney Rind asked the Chairman if he was saying that for now on in all cases, they could file summary judgments and have motions heard, debated, and then granted or denied and then come to a hearing. Chairman de la O responded that would be the procedure if there are no facts to dispute and that Attorney Rind could have an argument as to whether there was an agreement or not.

ACA Min stated that he would add that it should be material facts and not random facts.

Member Angel-Capo stated that she would not be voting on this item because she did not hear most of the discussion.

Following discussion the Board entered a motion to require the employee's attorney to file any facts that she wants considered with regards to the department's Motion for Partial Summary Judgment.

Motion by Member Dames, seconded by Chairperson de la O, that this matter be APPROVED. PASSED by the following vote.

Aye: Chairperson de la O and Dames

No: Scarola

Abstain: Angel-Capo

Vacant: **Vacancy

Following the Board's motion, ACA Min asked if Officer Lubin's case would be scheduled for the meeting of January 12, 2010. Chairman de la O responded in the negative. He went on to say that a hearing will be set on the Motion for Partial Summary Judgment after Attorney Rind responds to it and then the Board could see where it is with the facts.

ACA Min stated that is why he was trying to find out when the hearing would be scheduled. Chairman de la O responded that the Executive Secretary is responsible for scheduling cases so he could meet with her as to when the hearing would be scheduled.

ACA Min asked if there was a deadline for Attorney Rind to submit her response. In response, Chairman de la O asked Attorney Rind how soon could she have her response ready.

Attorney Rind stated that she would need at least 60 days to prepare a response.

Chairman de la O asked ACA Min if he had an objection to Attorney Rind's request for 60 days to file her response. ACA Min responded that he had no objection but if on the 61st day there is no response, he would assume that the Board would act on his Motion for Partial Summary Judgment.

Chairman de la O stated that he would assume that everyone would act in good faith.

NO OTHER DISCUSSION TOOK PLACE ON THIS MATTER.

E.4 Copy of Findings of Fact concerning the appeal hearing of Clive Vernon, Police Officer, relative to his termination, effective December 1, 2008. (DISCUSSION)

The Executive Secretary stated that Attorney Guttman-Valdes asked that this matter be deferred to the Board's next meeting.

ACA Min stated that he had no objection to this matter being deferred.

DEFERRED TO THE MEETING OF JANUARY 12, 2010 FOR BOARD CONSIDERATION.

E.5 Copy of Findings of Fact concerning the grievance hearing of Dave Condell, Paralegal, pursuant to Civil Service Rule 16.2. (DISCUSSION)

Chairman de la O asked ACA Min if he had any objections to the proposed findings of fact. ACA Min responded in the negative.

Chairman de la O asked if Mr. Condell was present. The Executive Secretary responded that Mr. Condell was not present; however, he was notified that this matter would be considered at today's meeting.

Member Dames stated that he was not present when Mr. Condell's case was heard by the Board. He went on to say that Mr. Condell's case involved all of the paralegals that were laid off so he wants to know if there was something in place to recall those individuals if in the future the City decided to hire paralegals. ACA Min responded that

Mr. Condell's name as well as the other paralegals' names were placed on a layoff register for 36 months so they would be the first to be called if the City Attorney decided to hire paralegals in the future.

Following discussion, the Board entered a motion to APPROVE the findings of fact concerning the grievance hearing on behalf Dave Condell, 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: Chairperson de la O, Dames, Scarola and Angel-Capo

Vacant: **Vacancy

E.6

Copy of Findings of Fact concerning the appeal hearing of Jorge Martinez-Esteve, Project Manager. (DISCUSSION)

ACA Min stated that the department filed a Motion for Reconsideration in the case of Jorge Martinez-Esteve (Item E.7) but he did not know if the Board would find the Motion moot because in reality it is supposed to be filed after the findings are issued but he filed it in an effort to expedite the matter rather than delay it.

Chairman de la O suggested that the Board consider the findings of fact first and then consider the Motion for Reconsideration. He asked ACA Min if he had any objections to the findings of fact. ACA Min responded that he had two issues one of which is that he would ask that language be included to state that the department requested a continuance when the case was initially scheduled and the request was denied by the Board. He went on to say that the second issue is he believes the language presented in the findings of fact are actually legal conclusions and not findings of fact.

Chairman de la O asked Attorney Rind if she had an objection to adding the language, "The City requested a continuance of the hearing to conduct further research in response to allegations by the Grievant but it was denied." Attorney Rind responded in the negative.

ACA Min stated that the second issue is more of a reorganization of the findings of fact rather than natural findings because he believes the findings of fact actually includes legal conclusions so he thinks it should be flushed out to state what the natural findings of fact are concerning factual issues and then what the legal conclusions are based on factual issues that the Board found. He went on to say that he believes the only factual issue presented was an order issued by a Trial Court Judge finding that the City Ordinance is subordinate to the Charter.

Chairman de la O stated that it appeared to him that it was a mixed findings of fact and Conclusions of Law. He asked both attorneys if they would have an objection to changing "Findings of Fact" to read "Findings of Fact and Conclusions of Law." Both attorneys responded that they had no objection.

Chairman de la O asked ACA Min if he had any other objections. ACA Min responded in the negative. He went on to say that Attorney Rind made a few changes to the findings of which he had no objection.

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

Vacant: **Vacancy

E.7

Copy of a "Motion for Reconsideration" filed by Barnaby Min, Assistant City Attorney, on behalf of the City of Miami, concerning the hearing of Jorge Martinez-Esteve, Project Manager. (DISCUSSION)

Item Addition

Chairman de la O asked Attorney Rind if she was asking that this item be postponed because she did not have an opportunity to review it. Attorney Rind responded in the affirmative. She went on to say that the department's Motion for Reconsideration was not on today's agenda because it was filed after 6:00 p.m.

ACA Min stated that the only reason he filed the Motion was as a matter of posture because he preferred to expedite the matter rather than delay it, but if it is the Board's pleasure to delay the matter another 30 days that was fine with him.

Chairman de la O stated that Attorney Rind is not prepared to address the Motion today and although he read the Motion he was not present when the hearing took place so he does not understand the Motion, therefore, he would suggest putting it off for the next hearing date.

Member Angel-Capo asked why was this item being moved to the Board's next meeting date. Chairman de la O responded that ACA Min filed the Motion yesterday, the Board received it at today's meeting, and Attorney Rind is not prepared to address the matter since she just received it this morning so he suggested that it be moved to the next meeting for consideration by the Board.

Attorney Rind stated as she understands it, the department has taken the position that even though Mr. Martinez-Esteve has been in the position (of Project Manager) for a number of years, they have now terminated him in violation of the Rules but is saying that he cannot be reinstated because he was not appointed correctly in the first place because they did not give him some type of test. She went on to say that this is a bizarre Motion.

Chairman de la O stated that he did not understand the Motion but he assumed that was because he did not hear the underlying facts of the case nonetheless, Attorney Rind wants to put this matter off to the Board's next meeting, but the Board does not have to honor her request and go forward with the matter today.

Attorney Rind stated that the reason she is not prepared to address the matter today is because she does not think it is a proper Motion. She went on to say that under Robert's Rules of Order there is a time to move for reconsideration and while she is not certain about Robert's Rules, she believes that this situation came up in another case before the Board.

Chairman de la O stated that in order to grant a Motion for Reconsideration, the Motion has to be made by a Board Member that voted in favor of the employee.

ACA Min stated that he cannot file a Motion until there is a written finding.

Chairman de la O stated that ACA Min can file a Motion but at the end of the day, whoever voted in favor of the employee has to make the motion on behalf of the Board.

Attorney Rind stated that she did not want to take up the merits of the case.

Chairman de la O stated that if no one on the Board feel there are any merits, then no one would make the motion.

Member Scarola stated that it needed to be determined which Members were present during the hearing of Mr. Martinez-Esteve. The Executive Secretary responded that a 3-Member Board which consisted of Chief Examiner Scarola, Member Cruz, and Member Angel-Capo heard Mr. Martinez-Esteve's case. She went on to say that the motion to reinstate Mr. Martinez-Esteve as a Project Manager was made by Member Angel-Capo, seconded by Member Cruz, and unanimously approved by the Board.

Member Scarola stated that based on the information from the Executive Secretary, either himself or Member Angel-Capo could make a motion (since Member Cruz resigned and was no longer a Board Member.)

Member Angel-Capo stated that she would like to know what the motion would be because her concern is that the holidays are upon us and Mr. Martinez-Esteve is still out of work.

ACA Min stated that the Motion for Reconsideration is not a motion to change anything [as voted on in the hearing].

Member Scarola stated that if no motion is made by himself or Member Angel-Capo, the findings of fact would be forwarded to the City Manager in lieu of considering the department's Motion for Reconsideration at the Board's next meeting.

ACA Min asked if he could lay out what the issues are so that the Board is clear. Chairman de la O responded that the two Members (who are in a position to make a motion) do not want to carry this matter over to the next meeting. He went on to say that Attorney Rind is the one who has the burden today, no one is making a motion to hear it today, so the matter would be put off to the January 12, 2010 meeting.

Member Angel-Capo stated that her understanding was if no motion is made by either her or Member Scarola that the findings would go directly to the City Manager. Chairman de la O responded that the Board has to at least hear ACA Min out to decide if the Board wants to hear the Motion so that is why he was asking if Board Members wanted to hear argument today as to why the department is saying the motion should be reconsidered, and it is at that time the Board can either grant or deny the department's Motion.

Following discussion, the Board entered a motion to go forward on the department's Motion for Reconsideration today which resulted as follows:

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

Aye: Dames, Scarola and Angel-Capo

No: Chairperson de la O

Vacant: **Vacancy

Chairman de la O stated that after the Board hears ACA Min's argument and Attorney Rind's response, the only two Members who could make the motion for reconsideration are Members Scarola and Angel-Capo, but any Member could second the motion. He went on to say that after the Motion for Reconsideration is granted, the Board can have a vote on whether it would change the outcome or not.

Member Angel-Capo asked what needs to happen if a Member is against the Motion for Reconsideration. Chairman de la O responded that if neither she nor Member Scarola make a motion, the Motion for Reconsideration dies. He asked ACA Min to provide the Board with his argument concerning his Motion for Reconsideration.

ACA Min stated that the argument presented by the department in the hearing was that Mr. Martinez-Esteve was an unclassified employee and therefore could be terminated without following the Civil Service Rules. He went on to say that at the Civil Service hearing, there was evidence and argument presented by the employee that Mr. Martinez-Esteve was a classified employee, so this Board made the decision that the position of Project Manager is a classified position and is therefore subject to the Civil Service Rules. ACA Min further stated that in addition to making that finding, the Board also made a finding and recommendation that Mr. Martinez-Esteve be placed back into the position of Project Manager. He stated that the department is not against placing Mr. Martinez-Esteve back into the position, but the department's concern is the case law on this point which is persons can only be hired as classified employees if the City Charter and Code are followed, which lays out all of the examination issues and the person has to be selected from an eligible register. ACA Min went on to say that he can understand the Board's frustration but that is the situation. He further stated that the reason he brought this matter up is because this case that is attached to the Motion is the same situation where there was a classified position that was converted to an unclassified position by the Board and the City Manager said at that time, that all of the detectives that were previously classified in the position would be hired into the unclassified positions since they were already in the position, knew what they were doing, and were the most competent. ACA Min stated that then there were other employees who sued the City because they felt what the City Manager did was unfair because they were not given an opportunity to fill the unclassified positions so that is the basis of his Motion.

Member Angel-Capo asked how long Mr. Martinez-Esteve was in the position of Project Manager. ACA Min responded that Mr. Martinez-Esteve held the position of Project Manager (unclassified) for five years; however, the Board made a finding that Mr. Martinez-Esteve's position is a classified position so if it is a classified position, it has to be filled pursuant to the Charter and Code which requires that employees be selected from an eligible register.

Chairman de la O asked Attorney Rind for her response to ACA Min's Motion. Attorney Rind responded that the department made the error of classifying Mr. Martinez-Esteve as an unclassified employee, allowed him to sit in the position for 5 years, and terminated him in violation of the Civil Service Rules. She went on to say that the department is now coming to the Board and saying that they are not disputing that the rules were violated but Mr. Martinez-Esteve does not get to be reinstated to his position because it was done incorrectly from the start, but that was not the employee's fault. Attorney Rind further stated that the department is in error and now wants to benefit from its own error which is absurd. She stated that she is trying to read through the case now that ACA Min provided but she has no clue of the rule that ACA Min claims to have been violated by the initial hire of Mr. Martinez-Esteve into the Project Manager position so she is asking what rule is opposing counsel relying on.

ACA Min responded that he is relying on Section 36(c) of the City Charter as having been violated.

Chairman de la O stated that the Charter is quoted in the opinion but he did not know if it had been changed or not since it is a 1952 case. ACA Min responded that the reference number is incorrect; however, the substance is the same in that persons in the classified

service have to be selected from an eligible register. He went on to say that to be clear, this Motion is not anti-Martinez-Esteve, rather they want to make sure that if the Board believes Mr. Martinez-Esteve's position is a classified position that it needs to be filled like a classified position (in accordance with the Charter and Code.)

Chairman de la O asked both attorneys if they wished to share anything else with the Board on this matter. Both attorneys responded in the negative. Following discussion, Chairman de la O called for a motion to reconsider the Board's decision in the matter of Jorge Martinez-Esteve. Hearing none, Chairman de la O stated that the Motion for Reconsideration is denied because no one on the Board that was eligible to make the motion, made the motion so the issue is resolved.

DISCUSSED : DEPARTMENT'S MOTION FOR RECONSIDERATION WAS DENIED.

For clarification purposes, Member Angel-Capo asked the Chairman if the Board's denial of the department's Motion for Reconsideration means that the matter of Jorge Martinez-Esteve's case will go directly to the City Manager and that the Board does not have to consider it at the January 12, 2010 meeting. Chairman de la O responded in the affirmative.

NO OTHER DISCUSSION TOOK PLACE ON THIS MATTER.

F. REPORTS

F.1 Pending Hearings as of December 15, 2009. (NOTIFICATION)

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 else he wished to add to his complaint. Attorney Bogdan responded that he submitted the information as requested by the Board which he thinks says everything that he needs to say.

Chairman de la O asked ACA Min for his position. ACA Min responded that he received Attorney Bogdan's brief this morning, but he was able to quickly summarize it and how he read the brief is there are a number of attachments and e-mails between Mr. Wolf, Members of the Civilian Investigative Panel (CIP) and the Executive Director. He went on to say that he still believes that based on the attachment, it still fails to meet the requirements of the Whistle blower Act and cited the case of Calder vs. ACT Corporation, 650 So.2nd,647, which stands for the proposition that the Chief Executive still needs to be notified even though there may potentially be a conflict between the requirement that the Chief Executive or a supervisor be notified and the court found that the Chief Executive must be notified. ACA Min further stated that he believes that there was insufficient evidence presented in the brief that was filed on Friday or the previous argument that was presented approximately a month ago that the Chief Executive was ever notified.

Chairman de la O stated that Attorney Bogdan's brief makes reference to the fact that Section 112 of the Florida Statutes says notification can be given to the Chief Executive Officer or any other appropriate person although he admits there is no case law interpreting what another appropriate official is. He went on to say that it is a remedial statute and it is to be liberally interpreted, so his question is why is a disclosure to the

Executive Director, the Independent Counsel, or Members of the CIP not a sufficient written disclosure. ACA Min responded that Chapter 112.3187(6) requires that the Chief Executive be informed and that is exactly what the court held in the case law of Calder vs. ACT Incorporation. He went on to say that even though there is other ambiguous language that a supervisor may be notified, subsection 6 states that the Chief Executive must be notified.

Chairman de la O stated that the last section of subsection 6 states, "however for disclosures concerning a local governmental entity..... the information must be disclosed to a Chief Executive Officer or other appropriate local official." ACA Min responded that "other appropriate local official" in this situation would be the City Manager's designee and there has been no designee that has been appointed by the City Manager to take these types of whistle blower complaints.

Chairman de la O asked ACA Min where the case law is that says the appropriate local official has to be essentially at the same level as the Chief Executive Officer or must be designated by the Chief Executive Officer. ACA Min responded that he had no case law on this matter.

Charles Mays, Independent Counsel to the CIP, stated that in addition to adopting ACA Min's argument, he just received Attorney Bogdan's brief for the first time this morning at 9:58 a.m. He went on to say that he heard Attorney Rind complain earlier that she received a document 6:30 p.m. last night (for discussion at today's meeting); however, if he had received Attorney Bogdan's brief last night, he would be in a position of making an intelligent response. Mr. Mays further stated that they have been totally sandbagged by Attorney Bogdan by delivering his brief not at the 11th hour but the 13th hour when in fact the matter was only continued because opposing counsel was not able to answer a fundamental issue such as jurisdiction. He stated that he offered at that point in time to sit and talk with Attorney Bogdan and his client about the position being taken, etc., but he did not hear from them instead he was sandbagged with this morning's brief from Attorney Bogdan. Mr. Mays stated that he would asked that the Board give him a reasonable opportunity to respond.

Mr. Mays stated that the Chairman asked what defines an appropriate local official and his response is that the Whistle blower Statute itself makes reference to a local governmental entity and it refers to that entity as defined in Chapter 447.203(9) and Chapter 112.3187(6). He went on to say that when one looks at Chapter 447.203(9), it defines a Chief Executive Officer obviously for the State of Florida and it goes on to say, "for other public employers should mean the person whether elected or appointed who is responsible to the legislative body of the public employer for the administration of the governmental affairs of the public employer." Mr. Mays further stated that the legislative body is the City Commission and the person responsible to the City Commission is the Chief Executive Officer of the City Miami which is the City Manager. He stated that in glancing through Attorney Bogdan's document what he saw was a series of e-mails generated between Mr. Wolf and a coalition of panel members which is disturbing. Mr. Mays went on to say that the document suggests that there are violations of the Florida Statute prohibiting public officials from discussing matters except in the Sunshine. He stated that the e-mails were not sent to the panel as a whole, but sent to designated panel members (CIP) none of whom that speaks for the panel or falls within the definition of Chief Executive Officer as defined in Fla. Statute 447.203(9). Mr. Mays went on to say that if the Board is considering the information that is submitted by Mr. Wolf at this late hour, then he thinks it would only be fair that the Board reset this matter to give him an opportunity to submit something in a timely fashion so that Attorney Bogdan and his client can read it and rebut it and also that the Board can read it and digest it.

Attorney Bogdan stated that he was not trying to sandbag anybody. He went on to say that he e-mailed his brief (on Friday) to the Civil Service Office expecting that it would be distributed to everybody, including Mr. Mays; however, the only response he received was to bring hard copies to the hearing which is what he did. Attorney Bogdan further stated that he understands that Mr. Mays did not have a chance to read his brief so on that basis, he does not have an objection if the matter is reset.

With regards to the argument made by ACA Min, Attorney Bogdan stated that he thinks the Statute is clear when it says, "for a municipality" so it could be any other appropriate official and the Statute goes on to specifically talk about communications to supervisory officials and he does not think there is any question that Mr. Wolf was communicating things that he believed were mismanagement and therefore the Statute provides for a remedy.

Mr. Mays stated that if his language is strong, he apologizes because he casts no aspersions upon Attorney Bogdan instead it is the procedure that is being followed that he strongly objects to.

Chairman de la O stated that he will get to the issue of whether this matter needs to be put off to a future meeting but he wants to find the section in the Statute that talks about supervisory employees. ACA Min responded that the section is subsection 7 and proceeded to read it into the record.

Chairman de la O stated that he also received Attorney Bogdan's brief at today's meeting and he tried as quickly as he could to read it, but he has not been able to digest it all. He went on to say so that the Board gets the decision right, he would rather put the matter off and have Mr. Mays and/or ACA Min address the specific issue about what "other appropriate local officials" means and how subsection 7 relates to subsection 6 because he is not understanding the interplay of the two since subsection 6 seems to be a jurisdictional requirement to whom the information must be disclosed and subsection 7 seems to cast a wider net.

Mr. Mays stated that at the risk of sounding arrogant, he does understand the difference between the two subsections and they will send that information forth via a written response. ACA Min responded that issue was the exact issue in the case he cited and provided an overview of the case law in support of his position.

Chairman de la O instructed ACA Min to attach the case law when he files his response which would make it easier for the Board to review.

Mr. Mays stated that with the Board's permission, in addition to attaching the case law, he will either underline or highlight the pertinent portion of the language in the Statute.

Chairman de la O asked Attorney Bogdan to summarize for the Board what disclosures if any were made to non-panel members. Attorney Bogdan responded that disclosures were made to two City Commissioners and to the panel members.

Chairman de la O asked Attorney Bogdan if any disclosures were made to the Executive Director and the Independent Counsel. Attorney Bogdan responded that he believed Attachment #2 was addressed to the Executive Director and Mr. Mays.

Mr. Mays stated that they are not stipulating to the authenticity of the e-mails because after Mr. Wolf left as part of normal protocol, they tried to get into the computer for which Mr. Wolf had exclusive possession and control of, and a lot of documents, including e-mails were missing.

Chairman de la O asked that the responses be submitted at least five days prior to the meeting date of January 12, 2010. Mr. Mays responded that he has a commitment the week of January 11 and asked for another date to set this matter. Chairman de la O responded that the matter will be set for the January 26, 2010 meeting for which Mr. Mays expressed no objection.

DEFERRED TO THE MEETING OF JANUARY 26, 2010 FOR BOARD CONSIDERATION.

H. TODAY'S HEARINGS

The meeting recessed at 11:50 a.m. and the Board reconvened at 1:18 p.m. for a presentation to one of its Members. On behalf of the Civil Service Board and staff, Chairman de la O presented a Certificate of Appreciation to Mariano Cruz for his 9 years of service as a Civil Service Board Member. Member Cruz resigned effective December 4, 2009.

H.1

Hearing of appeal on behalf of Larry Jackson, Police Sergeant, relative to his 40-hour forfeiture, effective March 9, 2007.

The Board entered into the appeal hearing of Sgt. Larry Jackson, the Appellant.

Barnaby Min, Assistant City Attorney, represented the Department.

Osnat K. Rind, Attorney at Law, represented the Appellant.

The Rule of Witnesses was invoked and all witnesses were sworn in individually. Chairman de la O instructed witnesses not to discuss the case before or after they testify and asked that the Video Department makes sure that the television is turned off in the lobby.

ACA Min made opening statements and Attorney Rind deferred opening statements.

Witnesses for the Department appeared in the following order:

1. *Larry Jackson, Police Sergeant (retired), City of Miami, Department of Police.*

Questions were posed by Board Members Dames and Scarola during the testimony of witness Larry Jackson.

2. *Dawn Campbell, Police Sergeant, City of Miami, Department of Police.*

3. *William Goins, Police Officer, City of Miami, Department of Police.*

Questions were posed by Board Members Scarola and Dames during the testimony of witness William Goins.

4. *George Law, Police Sergeant, City of Miami, Department of Police.*

Questions were posed by Board Members Scarola and Dames during the testimony of witness George Law.

The Department rested its case.

Witnesses for the Appellant appeared in the following order:

Javier Ortiz, Police Sergeant/Vice President, Fraternal Order of Police.

The Appellant rested his case and the Chairman called for closing arguments by both attorneys.

Following final argument, Chairman de la O stated that he was not sure if Standard Operating Procedure (SOP) 1-6 was in place at the time the incident occurred, he did not hear Sgt. Law say that he had a signed copy of SOP 1-6, and there is no reference to SOP 1-6 in the Internal Affairs (IA) report which is the reason he asked ACA Min if he had overlooked it in the report. He went on to say that there is no reference to SOP 12-6, but he would say that the preponderance of the evidence that the Board has seen based on the printout at the footer and header of 12-6 appears that it was SOP 12-6 that was in effect at the time and regardless, at the end of the day it is the department's burden to establish what SOPs are enforced and he does not think the department met that burden to establish that SOP 1-6 was enforced at that time. Chairman de la O further stated that he would say that it was Sgt. Jackson's scene at the second house and he thinks Member Dames' questioning of witnesses gives the reasons that it was his scene; however, Sgt. Jackson gave the money to Officer Gary who was at the station with Sgt. Campbell and all of the evidence, so he did not see a reason to hold Sgt. Jackson responsible when the money went missing. He stated that whether it was Officer Gary or not who stole the money or through his negligence some of the money was lost, at the end of the day if it was anyone's negligence, it was Officer Gary because he failed in his duty to secure the money properly. Chairman de la O went on to say that he did not see any reason to say that Sgt. Jackson did anything wrong. He further stated that ACA Min said in his closing that they all (officers) went home at the end of the day and did not worry about anything, but the testimony from Sgt. Jackson was that he went off to another scene and confiscated more weapons off of the streets of Miami so he thinks Sgt. Jackson was executing his duties on that day and did a commendable job with his investigation and even Sgt. Campbell testified that it did not occur to her to go to the rental car, find the rental receipt, and go to the second scene so he thought Sgt. Jackson performed good police work on that day. Chairman de la O stated that in terms of counting the money at the scene, Sgt. Jackson noted that the scene was clear at the time and by his calculations, there are over 800, \$20 bills in \$17,000 so it seems like it would have taken some time to count that amount of money. He went on to say that the scene may have been cleared initially, but that does not mean it is going to remain that way because if one were to read the IA report, a family member of Mr. Walker (victim) was driving by when she saw officers at his home and began calling other family members so that they could find out what was going on at Mr. Walker's home, so to sit and count \$17,000 would have taken some time [and it would not have been feasible to count the money at the victim's home.]. Chairman de la O further stated what may have been feasible would have been to take the money to the station (and count the money there.) He reiterated that he did not see how Sgt. Jackson was responsible for what occurred.

Member Scarola stated he recalled confiscating \$225,000 in one case and to sit and count all of that money could be very tough depending on the situation. He went on to say that the situation does dictate whether money should be counted on the scene (i.e., day, night, windy) so sometimes it is easier to remove the money from the scene to a station since there would be more space and more officers can count the money. Member Scarola further stated that he got the impression that the City was embarrassed by this case due to Officer Gary's actions so they decided to hold the supervisors (Campbell/Jackson) accountable for what they thought was misguidance on their part. He stated that there were two sergeants on the scene, but it appeared the department issued a harsher discipline to Sgt. Jackson than Sgt. Campbell because Officer Gary was assigned to Sgt. Jackson's team. Member Scarola went on to say that when there is a mixture of teams, someone should take responsibility from the start so that things are handled accordingly; however, at the end of the day he thinks the department was

embarrassed and disciplined Sgt. Jackson with the highest discipline it deemed appropriate in this case.

Member Dames stated that Sgt. Jackson did a great job investigating the scene and there is no doubt in his mind that Sgt. Jackson was in charge of the second scene. He went on to say that when Sgt. Jackson found the address of the second scene, he and his team headed over to that location and found weapons, drugs, and money and it was Sgt. Jackson's team that turned in the money so this again shows that Sgt. Jackson was in charge of the second scene. Member Dames further stated that supervisors trust officers of their team, but unfortunately one of the officers may have let Sgt. Jackson down (by taking money). He stated that he holds management (Sgt. Jackson) responsible because he has been a supervisor for 10 years and he agreed with Sgt. Law that lieutenants and above should have been called to the scene. Member Dames went on to say that he thinks Sgt. Jackson came off light with a 40-hour forfeiture (based upon what occurred.) Member Dames stated that Sgt. Jackson was charged with misconduct; however, he did not know how a missing \$14,000 could equate to misconduct because if it was someone on the street who committed this infraction, that person would have been taken to jail.

Following discussion, the Board entered a motion to find the Appellant NOT GUILTY of all of the charges 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: Chairperson de la O, Scarola and Angel-Capo

No: Dames

Vacant: **Vacancy

H.2 Hearing of appeal on behalf of Daniel Rodriguez, Police Officer, relative to his 40-hour suspension, effective February 24, 2009.

ACA Min stated that this case was settled; however, the agreement needs to be executed by the department's representative.

NO ACTION TAKEN BY THE BOARD; CASE WILL BE CLOSED UPON RECEIPT OF WRITTEN SETTLEMENT AGREEMENT.

H.3 Hearing of appeal on behalf of Shekita Johnson, Communications Operator, relative to her 8-hour suspension, effective February 8, 2009.

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

CONTINUED

H.4 Hearing of appeal on behalf of Harvey Nairn, Police Officer, relative to his 20-hour suspension, effective March 4, 2009.

The Board entered into the scheduled hearing of Officer Harvey Nairn, the Appellant.

Officer Nairn stated that he was only contesting the penalty.

ACA Min stated that if the Board is going to move directly to the penalty portion of Officer Nairn's hearing, he thinks the documents that he will introduce into evidence should be sufficient without him having to call any witnesses.

For clarification purposes, Chairman de la O asked Officer Nairn if he read the reprimand, does not dispute the factual allegations in the reprimand, and agrees that he violated the rules set forth in the reprimand. Officer Nairn responded in the affirmative.

Chairman de la O asked Officer Nairn if he only wanted a hearing on the penalty that he received. Officer Nairn responded in the affirmative.

Chairman de la O explained the hearing procedures to Officer Nairn.

Member Scarola asked the Chairman if the Board still needed to find Officer Nairn guilty of the charges since he does not dispute the factual allegations in the reprimand.

Chairman de la O responded that he would find out from Special Counsel Everett on this matter. Member Scarola stated that he only asked because he did not want to have a procedural issue come up some time later.

Barnaby Min, Assistant City Attorney, represented the Department.

Harvey Nairn, Police Officer, represented himself.

Chairman de la O stated that Officer Nairn was accused of the following violations:

*Departmental Order 1.11.6.17.14 - Leaving Post
Departmental Order 1.11.6.41.2 - False Statement
Civil Service Rule 14.2(e) 1 - Insubordination
Civil Service Rule 14.2(e) 2 - Breach of Proper Discipline
Civil Service Rule 14.2(k) - Negligent*

Chairman de la O asked Officer Nairn if he read the reprimand that was issued to him on October 28, 2008. Officer Nairn responded in the affirmative.

Chairman de la O asked Officer Nairn if he agreed with the facts stated within the reprimand issued to him on October 28, 2009. Officer Nairn responded in the affirmative.

Chairman de la O asked Officer Nairn if he agreed that he violated the departmental orders and Civil Service Rules that were read to him at the onset of his hearing. Officer Nairn responded in the affirmative.

Chairman de la O asked Special Counsel Everett if the Board needed to take a vote on the charges for which Officer Nairn admitted guilt. Special Counsel Everett responded that even if Officer Nairn is admitting to the violation, there was a need to vote on the charges.

Officer Nairn stated that the only complaint he has is he was penalized almost a week's pay for leaving his post.

The Board entered into the penalty phase of Officer Nairn's hearing.

Chairman de la O asked ACA Min what he wished to present in favor of the penalty (20-hour suspension) that was imposed upon Officer Nairn.

ACA Min stated that the only evidence he will rely upon is a 3-page document of Officer Nairn's disciplinary profile which includes similar related violations (of leaving his post.)

Chairman de la O stated that maybe he was not understanding the facts but he understands that part of it is leaving the assigned area but the other part is being untruthful to a superior officer.

Officer Nairn stated that with regards to the charge of being untruthful to a superior officer, his supervisor, Sgt. Casiano indicated in the reprimand that he was not at the NET Office; however, he was at the NET Office.

During Officer Nairn's hearing, Member Angel-Capo asked to take a break; therefore, the hearing recessed at 11:29 a.m. and reconvened at 11:43 a.m. In the absence of Member Angel-Capo, the Board continued with Officer Nairn's hearing.

Chairman de la O asked Officer Nairn to tell the Board what he thinks the appropriate penalty should be in his case. Officer Nairn responded that he was on a 3-hour detail so he thought it was excessive to penalize him for almost a week's pay for leaving his post.

Chairman de la O asked Officer Nairn if there was anything else he wished to say concerning the penalty. Officer Nairn responded in the negative.

Chairman de la O asked ACA Min if there was anything else he wished to say concerning the penalty. ACA Min responded that when the reprimand is looked at alone, the penalty seems excessive but when the reprimand is taken into conjunction with Officer Nairn's prior history, it is important for the Board to consider since the penalty changed from a reprimand only to a 20-hour suspension.

Chairman de la O read into the record Officer Nairn's disciplinary profile which revealed that he was employed from May 13, 1986 to present and has 58 commendations, 29 good citizen letters, 12 reprimands, 2 suspensions (10-hour suspension effective, May 18, 2001 / 80-hour suspension effective April 27, 1991), and 1 forfeiture of earned overtime (5-hour forfeiture effective August 5, 2008).

Cynthia A. Everett, Special Counsel to the Board, stated that she would like the Board's recommendation to note that Officer Nairn accepts the stipulation of his guilt for violating the rules and departmental orders.

Member Dames stated that he appreciated Officer Nairn's honesty in admitting to the violations; however, with regards to the penalty he believes in progressive discipline which he feels was not followed in this case when Officer Nairn received a record of formal counseling in May 2008 for the same charge of leaving his post.

Member Scarola stated that based upon Officer Nairn's admission of guilt to the charges set forth in the reprimand and making that admission in a public forum was admirable. He went on to say that according to the disciplinary profile, the only discipline that he could find relative to the charge of Officer Nairn leaving his post was a deficiency that he received; therefore, he felt the penalty of a 20-hour suspension was excessive.

Following discussion, the Board entered a motion to find Officer Nairn guilty of all of the charges and recommend to the City Manager that he receive a reprimand only in lieu of the department's recommendation of a 20-hour suspension. The motion resulted as follows:

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

Aye: Dames, Scarola and **Vacancy

No: Chairperson de la O
Absent: Angel-Capo

ADJOURNMENT:

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

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

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

Vacant: **Vacancy

The meeting adjourned at 3:51 p.m. Breaks were taken at 11:12-11:25 a.m.; 11:29-11:43 a.m.; 11:50-1:18 p.m. (LUNCH); and 2:40-2:46 p.m.

SIGNATURE:

Miguel M. de la O, Chairperson

ATTEST:

Tishria L. Mindingall, Executive Secretary