City of Miami

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

Meeting Minutes

Tuesday, April 21, 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 10:18 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 and Member Cruz

Absent: Member Angel-Capo

NOTE: Member Angel-Capo arrived at approximately 10:22 a.m. and a second roll call took place. The second roll call identified all members as being present.

A. APPROVING THE MINUTES OF:

Special Meeting of April 14, 2009.

The Board entered a motion to APPROVE the minutes of the special meeting of April 14, 2009 which resulted as follows:

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

Aye: Chairperson de la O, Dames, Scarola and Cruz

Absent: Angel-Capo

B. PERSONNEL MATTERS

B.1 Copy of a memorandum from Julie O. Bru, City Attorney, Office of the City Attorney, requesting an extension of probation of Monique L. Griffin, Typist Clerk III, for 90 additional days beyond May 6, 2009. (DISCUSSION)

Chairman de la O asked Ms. Griffin if she was aware that City Attorney Bru is attempting to extend her probationary period and if so, did she have an objection to the extension.

Monique L. Griffin responded that she was made aware of the department's request to extend her probationary period and that she had no objection.

Member Dames asked Ms. Griffin what the department's reason was for extending her probationary period and Ms. Griffin responded that the purpose of the extension is to allow time for her to enhance her skills in certain areas.

Member Dames asked Ms. Griffin if she agreed with [the department's reason for extending her probationary period] and Ms. Griffin responded in the affirmative.

Following discussion, the Board entered a motion to APPROVE the department's request to extend Ms. Monique L. Griffin's probationary period an additional 90 days beyond May 6, 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, Dames, Scarola and Cruz

Absent: Angel-Capo

C. MILITARY LEAVES OF ABSENCE

D. DISCIPLINARY MATTERS

D.1

Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Cesar Villafana, Police Officer, of a 10-hour suspension, effective April 18, 2009. No appeal to date. (NOTIFICATION)
Item Addition

NOTIFIED

D.2

Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Marcel Jackson, Police Officer, of his 20-hour suspension, effective April 18, 2009. No appeal to date. (NOTIFICATION)
Item Addition

NOTIFIED

D.3

Copy of a letter from Chief John F. Timoney, Director, Department of Police, notifying Kevin Williams, Police Officer, of a 10-hour suspension, effective April 17, 2009. No appeal to date. (NOTIFICATION)
Item Addition

NOTIFIED

E. GENERAL ITEMS

E.1

Copy of Findings of Fact concerning the appeal hearing of Angela Glass, Communications Operator, relative to her 40-hour suspension, effective September 11, 2006. (DISCUSSION)
Deferred from the meeting of April 14, 2009.

Chairman de la O asked both the department and employee attorneys if they had any objections to the proposed findings of fact.

Assistant City Attorney (ACA) Diana Vizcaino and Attorney Osnat K. Rind responded in the negative.

Following discussion, the Board entered a motion to APPROVE the findings of fact which resulted as follows:

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

Aye: Chairperson de la O, Dames, Scarola and Cruz

Absent: Angel-Capo

E.2

Copy of a "Motion for Consolidation" filed by Diana Vizcaino, Assistant City Attorney, on behalf of the City of Miami, concerning the hearing of appeal of Jorge L. Torres, Mason, (Osnat K. Rind, Attorney) regarding his 40-hour suspension. (DISCUSSION)

Hearing of appeal is scheduled for today.
Item Addition

Chairman de la O stated that Item E.2 concerning the appeal hearing of Jorge L. Torres and Item E.3 concerning the appeal hearing of Pedro C. Torres will be considered together since ACA Vizcaino's Motion is to consolidate these two cases. He went on to say that since Teri Guttman-Valdes, Attorney on behalf of Pedro C. Torres was not present, the Board would revisit this item.

The Executive Secretary stated that she received a notice from Attorney Guttman-Valdes which indicated that she would not be able to make today's meeting, but in theory she is not in favor of consolidating the two cases.

Chairman de la O stated that he understands Attorney Guttman-Valdes' objection, but the question is whether she wants to be heard [on this issue] and if so, does this matter need to be postponed so that she can be present to argue the matter.

Attorney Rind stated that her client is Jorge Torres and his case is scheduled for a hearing today.

Chairman de la O stated that since Jorge Torres' case is scheduled for today, he would like to know from the department's attorney if she was moving to consolidate and continue Jorge Torres' case.

ACA Vizcaino stated that if the Board denies her Motion for Consolidation, she would be prepared to go forward with Jorge Torres' case today; however, she thinks her motion is well-founded and in good faith because in her opinion, it makes no sense to hear this case twice. She went on to say that by not consolidating the cases, the employee and department witnesses would be subject to testifying twice; therefore, she would ask that the Board consider the labor, expense, time, and the witnesses being subjected to cross-examination twice [when voting on this motion.]

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 Dames, Member Angel-Capo and Member Cruz

---

The Board continued with discussion of the department's Motion for Consolidation of the cases of Jorge L. Torres and Pedro C. Torres.

Chairman de la O asked for the employee's position on why the cases should not be consolidated.

Attorney Rind responded that the cases should not be consolidated because every employee has the right under the Civil Service Rules to their own due process. She went on to say this is not a case where two persons have conspired together to commit a crime, but it is one employee who allegedly got into a fight with another employee and they are diametrically opposed. Attorney Rind further stated that it would not be fair to have what she thinks would amount to a circus if she has to defend against two attorneys at the same time. She stated that she understands ACA Vizcaino's reason for wanting to consolidate the cases is so that Attorney Guttman-Valdes could cross-examine her witnesses to prove her case and vice-versa, but this would not be fair to her client. Attorney Rind went on to say that there is a statement in the Motion that indicates the claims and anticipated defenses are identical in both cases; however, she does not think they are and that it puts her and her client in a position they should not have to be in. She further stated that there is no provision for having to defend against two lawyers at the same time in the Civil Service Rules, there is no common

claim or defense, and each employee is entitled to his/her own due process hearing.

ACA Vizcaino stated that if this was a court of law, these cases would have been heard together. She went on to say that there are rules of civil procedures to address this matter on target and although they are inapplicable before this Board, which is the reason she did not cite them in her motion, it is the same set of facts. ACA Vizcaino further stated that Attorney Rind raised points [as to why the cases should not be consolidated], but she did not see the prejudice to either Jorge or Pedro Torres because they would be receiving their due process and their cases would be heard by the Board. She stated that it makes absolutely no sense for the Board to hear the same exact set of facts on more than one occasion.

Following discussion, the Board entered a motion to DENY the department's Motion to consolidate the hearings of Jorge and Pedro Torres. Before voting, the Chairman asked if there was any discussion on the motion.

Member Scarola asked Special Counsel Everett to tell the Board if she knows the answer to what would be the court's stance in a criminal case whereby two defendants were engaged in a fight and they each accused the other of being the aggressor [of the fight] because as much as he does not want to hear the same testimony twice, he would be willing to do so if it is the proper thing to do, which is that both Jorge and Pedro Torres be given a fair hearing if they elect to have their cases heard separately.

Cynthia A. Everett, Special Counsel to the Board, stated that she thinks Member Scarola hit on the exact issue which is to ensure that each employee gets a fair hearing and the Board has to ultimately make that decision. She went on to say that the only [discussion] she has heard with regards to the Torres cases is that the incident involved physical contact between both employees so it is hard to put this situation [of whether to hold the cases individually] in a criminal context because more likely in a criminal case, this would not be the case because the decision would be made that one of the two persons is the aggressor. Special Counsel Everett further stated that at first blush it would seem appropriate to consolidate the two cases for the reasons so stated in ACA Vizcaino's motion, but the only issue she could see is that both employees are represented by legal counsel so she did not know if either side planned to call the appellant as a witness, and because Attorney Guttman-Valdes is not present today this may present a problem of concern. She stated that if either side is not going to call the other employee, it would seem less problematic to consolidate the cases, but this is something the Board may want to hear from both counsels [Rind / Guttman-Valdes] in terms of how they plan to present their cases and what possible prejudices there could be. Special Counsel Everett went on to say that she would suggest that the Board entertain further discussion on the actual prejudices that could result if the cases were consolidated.

Chairman de la O stated that if the Board were to view the incident involving Jorge and Pedro Torres as a criminal case, their cases could not be consolidated and if they are viewed as a civil case, then the risk of an inconsistent verdict from a case that evolves from the same facts generally would be consolidated unless there was some real prejudices to both sides, which he has not seen in this case so far. He went on to say that these are administrative cases, so he did not see how they could be viewed as being a criminal case.

Member Scarola stated that he was only looking for guidance on how a criminal case would be handled because his main concern is what would happen if one of the defendants did not want to take the stand or any other issues that could arise. He reiterated that he rather not listen to the same testimony twice, but at the same time, he wants to make sure the employees have a fair hearing even if that meant hearing their

cases separately.

Special Counsel Everett stated that Member Scarola mentioned the issue of an employee not wanting to testify and that she could only say that she did not know which witnesses were subpoenaed to be present or the status of the two employees [in terms of the discipline received], but she thinks there are provisions in the Civil Service Rules and Regulations concerning employees who are asked to testify before proceedings and their responsibilities and consequences thereof, so she did not see that being a concern, but that's a decision a person would have to make. She went on to say that in any court action, a person can refuse what the judge or subpoena has to say, but the person would have to accept the consequences of their actions.

Member Scarola stated that it is the department's burden to prove its case against each employee and he sees a prejudice if the cases are consolidated so this is the point he was making when he asked the question.

Member Cruz stated that he does not understand why the cases have to be consolidated because the main point is everyone that comes before the Board is entitled to justice and fair treatment.

Chairman de la O stated that he is guessing that the department's motion is going to be denied and if it is, ACA Vizcaino could consider presenting transcripts for the next case [of Pedro Torres] because as Member Scarola reiterated, he too does not want to hear the testimony twice.

Following discussion, the motion on the floor to DENY the department's Motion to Consolidate the cases of Jorge and Pedro Torres resulted as follows:

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

Aye: Dames, Scarola, Angel-Capo and Cruz

No: Chairperson de la O

E.3 Copy of a "Motion for Consolidation" filed by Diana Vizcaino, Assistant City Attorney, on behalf of the City of Miami, concerning the hearing of appeal on behalf of Pedro C. Torres, Automotive Equipment Operator, (Teri Guttman-Valdes, Attorney) regarding his 24-hour suspension. (DISCUSSION)

Item Addition

DISCUSSED ---BOARD DENIED MOTION FOR CONSOLIDATION (See Item E.2 for Details.)

F. REPORTS

F.1 Pending Hearings as of April 21, 2009. (NOTIFICATION)

PRESENTED

G. REQUESTS FOR HEARINGS

G.1 Copy of a Request to Appear from Raul Cabrera, Police Officer, concerning his resignation from employment. (DISCUSSION)

Attorney Rind informed the Board that she represents Officer Cabrera. She went on to say that the Board should have in its possession Officer Cabrera's resignation memo dated February 20, 2009, his revocation memo of his resignation dated February 23, 2009, and a copy of the Internal Affairs (IA) summary. Attorney Rind further stated that Officer Cabrera was employed with the City of Miami Police Department for more than 9 years and that on February 20, 2009 he was called into Internal Affairs (IA) regarding an investigation that took place against him. She stated that the underlining facts for these proceedings today are not particularly relevant, but there is something relevant in the IA document that she will point out to the Board. Attorney Rind provided the Board with an overview of what happened on the day Officer Cabrera was called to the IA Office and seen by two sergeants who issued him a reprimand and threatened him with termination concerning the allegations contained in the IA summary. She stated that the sergeants suggested to Officer Cabrera that he should resign if he did not want to get terminated and if he did, it would be better for him because then he would not lose his FDLE Certification, the IA incident would not appear on his record, and he would maintain his pension money, which was a total lie. Attorney Rind went on to say that she explained Officer Cabrera's situation to say that there is case law that talks about a resignation that was obtained by duress.

Attorney Rind stated that a former Civil Service Board overturned a resignation, which was approved by the Third District Court of Appeals (DCA) in a case called City of Miami vs. Mary Meynarez, which was a 1989 decision and there was another case, Lawrence A. Mullan vs. Bishop of the Diocese of Orlando, which was a case about whether a resignation was obtained via duress. She went on to say that she raised the Meynarez Case to dissuade any doubt that the Board has an absolute right to consider whether Officer Cabrera's resignation is effective or not under this theory of duress. Attorney Rind further stated that the test the Courts used to determine if a resignation was done via duress are: (a) The act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will, and (b) that this condition of mind was caused by some improper and coercive conduct of the opposite side. She stated that the first prong was satisfied in the Mullan's case because the resignation was announced by the employer as the only alternative to being fired and it supports the first essential element of duress, which is what the Board has in Officer Cabrera's case because Officer Cabrera did not ask if he could resign instead of being terminated rather he was told by the sergeants that the only alternative he had to the termination was to resign, which is what the Third DCA also said in the Meynarez case and what the Board found at that time. Attorney Rind went on to say that the second element of duress [the condition of mind was caused by some improper and coercive conduct of the opposite side] was satisfied, in her opinion, when the sergeants put into the mind of Officer Cabrera the threat that he would lose his certification and pension monies if he did not resign. She further stated that Officer Cabrera was given a red-line memo so that he could resign, which he did that same day. Attorney Rind stated that [this action by the sergeants] in and of itself would be sufficient to satisfy the second element, but there was more because in both cited cases, they indicated that if the employer did not have the authority to do what he was threatening or did not have the authority to terminate, this would also satisfy the second element. She went on to say that [the action by the department] was improper because the department did not have the right to terminate and that is why she provided the Board Members with the [IA] memo that delineates the allegations against Officer Cabrera. Attorney Rind directed the Board's attention to the second page of the IA summary and read a portion of the memo into the record in support of her argument.

ACA Vizcaino stated that she objected to Attorney Rind referring to an issue in an IA investigative report for which Officer Cabrera was not disciplined and that she did not think had anything to do with what Officer Cabrera is requesting, which is a hearing based on an alleged termination. She went on to say that she thinks the merits of the IA

investigation are not relevant, Officer Cabrera was not disciplined; therefore, the Board should not consider anything that is included in the IA report.

Chairman de la O overruled the department's objection and stated that he would allow Attorney Rind to point out information in order to meet the prima facie burden since she is making a case for a hearing.

Attorney Rind provided a time line of when the IA report came about and a reprimand that was produced to Officer Cabrera for the first time on February 20, 2009. She went on to say that the Board is aware of the Florida Statute that prohibits a department from disciplining an employee more than 180 days after they are given notice of the underlying allegation. Attorney Rind further stated that the IA document proves on its face that the department knew about the allegations since June 6, 2008 and did not complete its investigation until January 22, 2009 and informed Officer Cabrera for the first time on February 20, 2009 that he was going to be terminated based on the allegations that occurred more than 180 days prior; therefore the department did not have the right under the Florida State Statutes to issue discipline to Officer Cabrera. She stated that if she were to put aside the fact that the department lied to Officer Cabrera when they told him he would not lose his pension money and state certification if he resigned, they definitely had no right to threaten him with termination or any type of discipline. Attorney Rind went on to say that based on the facts she provided, including the fact the department more recently accepted the resignation recission of Commander Lorenzo Whitehead, the Board should deem Officer Cabrera's resignation as obtained through duress and he should therefore be entitled to a hearing.

Chairman de la O asked for the department's position on this matter.

ACA Vizcaino stated that in response to the 20-year old case law that was presented by Attorney Rind, she would like an opportunity to review and distinguish the cases before the Board; therefore she would reserve her argument with regards to the case law. She referred the Board to the case of Tyrell Williams that was considered by the current Board members, in which he was trying to withdraw a resignation the same as Officer Cabrera is trying to do today. ACA Vizcaino went on to say that according to the October 7, 2008 minutes in which Mr. Williams' request for an investigation pursuant to Rule 16.1 was considered, the Executive Secretary stated that "the Board cannot entertain a withdrawal or an appeal of a resignation." She further stated that Officer Cabrera was not terminated, but he resigned according to a memo he submitted dated February 20, 2009 of which it indicated that he was withdrawing from his position as a police officer effective February 20, 2009 and that he also thanked the department for the opportunity it gave him [to become a police officer]. ACA Vizcaino stated that three days later Officer Cabrera had a change of heart and attempted to withdraw his resignation. She went on to say that Attorney Rind had not made the argument that when Officer Cabrera signed the disciplinary letter, he checked off the box which states that he disagrees with the facts as written in the disciplinary document and the penalty, but there was no disciplinary document because he resigned and there was no penalty; therefore, she does not see how a hearing could be granted pursuant to Rule 14.3 as requested by the employee. ACA Vizcaino further stated in the Tyrell Williams case, Mr. Williams made allegations of duress against the Union President of Solid Waste (Joe Simmons) for similar allegations that Attorney Rind made today and as a result this Board less than 6 months ago denied his request for the mere reason that he made a conscious decision to resign so she did not see how the two cases are different. She stated that in Officer Cabrera's case, neither was he placed under oath and nor did he testify. ACA Vizcaino stated that Mr. Williams was employed a little over 9 years, which meant that he was months away from becoming vested and while under oath he stated that the Union President forced him to sign a resignation letter and also made similar promises that he would keep his pension if he resigned which are the same allegations

made by Attorney Rind. She went on to say that the if the Board is going to entertain Attorney Rind's argument concerning the IA report or the discipline that Officer Cabrera never received, and that IA took more than 180 days to investigate the complaint brought against Officer Cabrera that was issued June 6, 2008, she does not understand why Officer Cabrera did not allow IA to terminate his employment because had he done so, rightfully he could have come before this Board pursuant to Rule 14 concerning his termination. ACA Vizcaino reiterated that Officer Cabrera made a conscious decision to resign, he thanked the department for his opportunity and time in the department and he resigned.

Chairman de la O stated that the Board will decide today whether there should be a hearing where eventually this issue [of whether Officer Cabrera resigned under duress] would be flushed out with testimony. He went on to say that the Tyrell Williams case at first blush bothered him, but he does not think Mr. Simmons speaks for the department, but for the union.

ACA Vizcaino stated that she did not think it mattered whether Mr. Simmons speaks for the department or not because the allegations of duress were against a City employee and Mr. Simmons is also a City employee.

Chairman de la O further stated that the case law that has been presented to the Board today was not presented in the Tyrell Williams case which is why having a lawyer is important so that they can do research. He went on to say that if the department takes the position that Mr. Simmons speaks for the department although he is sure the department would not, then Mr. Williams could have used the case law presented by Attorney Rind because it says that when the opposite side, in this case being the department, makes incorrect statements or are engaged in an act of duress, a resignation is not voluntary. Chairman de la O further stated that he is not sure it would have been the same result in Mr. Williams' case but, he could see where the Board probably would have given him a hearing if the case law was presented, but it was not and he was not aware of the case law and therefore his request for an investigation was denied by the Board. He stated that he did not see why the Board should not have a hearing as to whether there was duress and that ACA Vizcaino is right that the Board is not going to make a determination because not only is Officer Cabrera not under oath, he has not testified. Chairman de la O went on to say that the only thing the Board heard is a proffer from Officer Cabrera's attorney and based on that proffer unless there is a counter proffer to indicate that the proffer or case law is completely wrong, then it would seem to him the need to hold a hearing to determine whether Officer Cabrera was under duress (when he resigned).

ACA Vizcaino referred the Board back to the October 7, 2008 minutes where Chairman de la O stated he felt that perhaps in the Tyrell Williams case a hearing should be granted pursuant to Rule 16.1, but not a hearing on the termination because there was no termination in that case. She asked if the Board decides to consider the allegations and argument made by Attorney Rind, would the Board consider it under a Rule 16 investigation.

Chairman de la O asked both attorneys what they felt should be the appropriate Rule [the Board should proceed under] for hearing this case.

Attorney Rind responded that the case should be heard pursuant to Rule 14.3 and ACA Vizcaino thought that the case should be heard pursuant to Rule 16.1 and both attorneys provided argument in support of their position.

Chairman de la O asked the department's attorney if she had an opportunity to read the case law presented by Attorney Rind.

ACA Vizcaino responded in the affirmative and provided an overview as to how the case law supported her position of holding a Rule 16.1 hearing and Attorney Rind provided counter argument in support of her position.

Chairman de la O stated that he thought Officer Cabrera should put testimony on the record other than his attorney's proffer of what occurred in terms of the (alleged) duress.

Attorney Rind stated that she did not understand why the Chairman would ask her client to put on testimony if the Board is going to grant a hearing to hear from him [as to whether there was duress] at some future time.

Chairman de la O stated that he was not saying that Officer Cabrera would be cross-examined, but he thinks the Board should have something substantive on the record to justify granting a hearing based upon duress. He went on to say that he is assuming that Officer Cabrera will repeat what was presented by his attorney, but he thinks the Board should have something on the record.

Attorney Rind asked the Chairman if he was saying that Officer Cabrera would not be cross-examined by ACA Vizcaino.

Chairman de la O responded in the affirmative. He went on to say that the Board is going to make a prima facie decision to determine whether the Board should hold a hearing.

ACA Vizcaino responded that since Officer Cabrera is going to have an opportunity to be heard by the Board on whether he was subjected to duress, she would then like to have someone present from IA to testify how he was not subjected to duress.

Attorney Rind stated that the request made by opposing counsel is what she was afraid would happen (once the Board asked her client to give testimony).

Chairman de la O stated that the Board is not going to make a determination now so he will deny ACA Vizcaino's request. He went on to say that Attorney Rind does have a prima facie burden in order to be granted a hearing, so the Board wants some substantive evidence on the record. Chairman de la O call Officer Raul Cabrera forward, he was sworn in and asked to tell the Board what were the circumstances that led up to him resigning.

Attorney Rind asked the Chairman if he wanted her to ask Officer Cabrera about what led up to his resignation in the form of questioning.

Chairman de la O responded in the negative. He went on to say that Officer Cabrera could just tell the Board what happened himself.

Officer Cabrera stated that during the time in question, he was working the midnight shift which was from 9:00 p.m. to 7:00 a.m. He went on to say that when he went to work on February 19, 2009, he was advised that his schedule had been changed for the next day, Friday, February 20, 2009 and to respond to IA at 3:00 p.m. Officer Cabrera further stated that he worked the entire night on February 19, 2009 and that he had a physical the next day at 7:30 a.m. with the City doctor so he fasted that entire night because he had to have blood drawn. He stated that following the physical, he went home and took a 2-hour nap at which time he responded to IA as he was ordered to do. Officer Cabrera went on to say that when he arrived at IA, he was not under the assumption that he was being terminated or that his going to IA had anything to do with a complaint against him.

Chairman de la O asked Officer Cabrera what the department representatives told him with reference to whether he should resign or not.

Officer Cabrera responded that he was told he would be relieved of duty pending termination.

Member Cruz asked Officer Cabrera who was it that told him he would be relieved of duty and terminated.

Officer Cabrera responded that there were two individuals in the room with him, which were Sergeants Ibalmea and Bain.

Chairman de la O asked Officer Cabrera what the sergeants told him about his benefits and certification.

Officer Cabrera responded that he was told that if the [disciplinary] package went through [approval by the Police Chief], it would then be sent to the Federal Department of Law Enforcement [FDLE] and he would be subject to losing his certification.

Chairman de la O asked Officer Cabrera what he was told about his pension.

Officer Cabrera responded that he was told that if he resigned, he could keep his One Percent Fund money, his pension, and he would possibly be able to find employment with another department by keeping his certification active. He went on to say that he was also told that if he resigned and sought employment in the future, the reprimand concerning the IA incident would be in his file, but the recommended punishment would not show if his personnel file was to be reviewed by the new department for which he was seeking employment.

Chairman de la O asked Special Counsel Everett if there was anything that prohibited the Board from having both a Rule 14 and 16 hearing.

Special Counsel Everett responded that she would say theoretically no, but her question is what would be the practical point because she would assume the facts would fit under one scenario or the other, the Board would resolve the issue, so there would be no reason to have two hearings.

Chairman de la O stated that he did not mean two separate hearings, but two consolidated hearings under both rules. He asked if the Board has ever entertained one hearing under both rules.

Special Counsel Everett responded in the negative. She went on to say that according to the facts of this case, it would be difficult to do.

Chairman de la O stated that he only asked because he wants to tell everyone what their options are.

ACA Vizcaino stated that she does not think the Board inquired as to the circumstances surrounding the document whereby Officer Cabrera resigned because it is her understanding that he went back to his car, thought long and hard, prepared a handwritten letter of resignation, went back upstairs and submitted his letter. She went on to say that if the Board is going to entertain the allegation of duress, the Board should inquire into the document Officer Cabrera wrote in his own handwriting inside of his car, and the fact that he was open to consult with any representative he chose.

Chairman de la O stated that he does not think anyone is denying that Officer Cabrera wrote and signed the letter, and that it would be different from the [Tyrell Williams] case in that sense.

Special Counsel Everett stated that she thinks the Chairman should explain to the Board the facts as they are now and also that there is no basis for a Rule 14.3 hearing in this case.

Chairman de la O stated that in the case law presented by Attorney Rind, the Court said the Board had the power under Rule 16.1 to entertain a claim of duress to make a recommendation to the City Manager and the Manager had to give the employee due process. He went on to say that Attorney Rind is asking that the hearing be conducted pursuant to Rule 14 of which she presented argument and provided case law, and Special Counsel Everett's position is there is no basis under Rule 14 to proceed with Officer Cabrera's case.

Attorney Rind stated that the mere fact Officer Cabrera's revocation of his resignation was not accepted meant there had been a termination and therefore, the hearing should be conducted pursuant to Rule 14.

Following discussion, Member Cruz made a motion to grant a hearing pursuant to Rule 16.1. The motion DIED FOR LACK OF A SECOND.

The motion having died, the Board entered a motion to GRANT a hearing pursuant to Rule 14.3.

Under discussion, Chairman de la O stated that at the end of the day, it makes no difference [how the Board proceeds] because the Board is going to make a recommendation to the City Manager either way. He went on to say that the department's position is there is nothing to appeal because the City did not [issue discipline] and the employee is saying that the City did terminate Officer Cabrera by refusing to accept the revocation of the resignation, which is what the employee is appealing. Chairman de la O further stated that when the Third DCA was reviewing the Meynarez case, it talked about holding the hearing under Rule 16.1, but that does not mean the Board does not have the power to conduct the hearing under Rule 14.3 and the Board's Special Counsel is saying it makes more sense to hold the hearing pursuant to Rule 16 than Rule 14.

Special Counsel Everett stated that [the key point is] it is not that it makes sense to hold a Rule 16 hearing in this matter, but that there is no basis for an appeal because at least in the record that was developed today, there was no decision or action that was taken by the department against Officer Cabrera. She went on to say that the Board can allow Officer Cabrera to be heard and to pursue this matter and ultimately make a recommendation to the City Manager as the Board could under a proper Rule 14 hearing by having a 16.1 investigation.

Member Angel-Capo asked if the department did not accept Officer Cabrera's revocation of his resignation would that be considered a termination.

Special Counsel Everett responded that Member Angel-Capo was making a very general statement. She went on to say that if an employee requests that he/she be taken back by the employer after resigning, it would be a termination in the sense that the definition of a termination is an ending to Officer Cabrera's employment. Special Counsel Everett further stated that in terms of who made that decision (to sever employment), she would disagree that this would be a termination (by the department).

Chairman de la O stated that this matter is becoming clearer to him. He went on to say that what the Board is trying to review is not the department's decision to not accept the revocation of the resignation, but the Board is trying to review whether the department forced Officer Cabrera to resign, which is not a decision but an act of the department, which is not like issuing discipline such as a reprimand. Chairman de la O further stated that the act could be characterized as an abuse of power which would be a violation of the Rules because employees are not supposed to be forced to resign especially if Attorney Rind is right that the reprimand was untimely, so this case just seems to be more of a Rule 16 than a Rule 14 hearing which is a decision that can be reviewed. He stated that it is not a decision to impose duress on an employee, but it is a set of actions and not a decision that the Board would normally review on an appeal, so it has become clear to him that it should be a Rule 16 hearing.

Chairman de la O stated that another way to look at this matter is that according to a hearing under Rule 14.3, the burden of proof would be on the department which means that the department would put on its case first and would have to justify the actions it has taken, and under Rule 16, the burden of proof would be on the employee who is complaining about something the department has done to him/her. He went on to say that the reality is the employee resigned, but he has a good excuse for why he resigned, but it has to be Officer Cabrera's burden to prove the duress not the department. Chairman de la O further stated that it is the employee who is making the assertion that he was forced to resign so he should have to prove that this was the case. He went on to say that Attorney Rind brought forth good arguments, but the facts may not bear them out; however, if the facts are as Attorney Rind presented them and there is not a proper response to it, then he thinks the employee would probably meet his burden.

Attorney Rind stated that if this is a case for a Rule 16 hearing, she wants to know what the City Manager would be asked to do in this case.

Chairman de la O stated that if it is proven that he was forced to resign, the Board's recommendation would be that Officer Cabrera be reinstated. He went on to say that unless he did not understand the matter at hand, which he does, Officer Cabrera could not be complaining about a termination because he was not disciplined on the underlying charge, so his complaint could only be that the department would not let him revoke his resignation.

Attorney Rind stated that she is afraid that if the Board says that the resignation was ineffective, the department could then say it has a basis for termination.

Member Angel-Capo asked if this was the case [as expressed by Attorney Rind] wouldn't the department have to bring forth charges.

Chairman de la O responded in the affirmative.

Attorney Rind stated that if this was the part of duress, it is as if [the termination] did not occur, but there has been a termination.

Chairman de la O responded there has not been a termination, but a resignation that the employee wants to undo and if Attorney Rind is successful in her arguments, it would result in the Board issuing a report to the City Manager that Officer Cabrera did not voluntarily resign therefore, he should be reinstated.

Attorney Rind stated that if Officer Cabrera did not voluntarily resign, then he was terminated.

Chairman de la O stated that the recommendation would be that Officer Cabrera should

be able to revoke his resignation. He went on to say that the City Manager should accept the remedy but if he does not, the employee still would have appellate remedies and if the City Manager accepts the recommendation, the department still can bring disciplinary claims against Officer Cabrera. Chairman de la O further stated that the department is frozen in time so whether the department is untimely or timely so be it, but at that time Officer Cabrera would be put back to work. He stated that if Attorney Rind is correct in the arguments she made, Officer Cabrera should have been allowed to revoke his resignation, which is all that the Board can review because there is nothing else to review because he was not disciplined. Chairman de la O went on to say that the disciplinary action did not become finalized so there is nothing else for the Board to review.

Attorney Rind stated that she disagreed with the Chairman. She went on to say that her client brought his complaint under Rule 14 and there is a process under this rule so if it does not make a difference [how the Board proceeds], she did not see the harm of having the hearing proceed under Rule 14.3.

Following discussion, the motion on the floor which is to GRANT a hearing pursuant to Rule 14.3 resulted as follows:

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

Aye: Dames, Scarola, Angel-Capo and Cruz

No: Chairperson de la O

Following the motion to grant Officer Cabrera's request for a hearing pursuant to Rule 14.3, ACA Vizcaino stated that she thinks the department was prejudiced; therefore, she needs clarification on the approved motion, guidance from the Board as to how she is to proceed from this point forward, and a determination as to what she needs to prove concerning Officer Cabrera's resignation since she now has the burden of proof.

Chairman de la O responded that ACA Vizcaino is aware of the issues because they were presented today and she knows what Officer Cabrera's testimony is going to be; therefore, she would need to prove that Officer Cabrera's resignation was voluntary.

ACA Vizcaino stated that she wants the Board to understand that it has just set precedence that it would hear complaints on every resignation that is submitted and that the department would have the burden of proving every resignation filed by an employee.

NO OTHER DISCUSSION TOOK PLACE ON THIS MATTER.

H. TODAY'S HEARINGS

H.1 Hearing of appeal on behalf of Barbara Shaffner, Police Officer, relative to her 10-hour suspension, effective August 14, 2005.

ACA Vizcaino stated that there is a pending settlement of this case; therefore, she would ask that the matter be placed back on a future agenda once the settlement is finalized.

NO ACTION TAKEN : AWAITING COPY OF SETTLEMENT TO CLOSE THIS CASE.

H.2 Hearing of appeal on behalf of Jorge L. Torres, Mason, relative to his 40-hour suspension, effective September 20, 2007.

The Board entered into the scheduled hearing of appeal on behalf of Jorge L. Torres.

Diana Vizcaino, Assistant City Attorney, represented the Department.

Osnat K. Rind, Attorney, represented Jorge L. Torres (Appellant).

The Rule of Witnesses was invoked and the witnesses were removed from the chambers and instructed not to discuss their testimony with one another.

Chairman de la O called for the presentation of opening statements by both attorneys.

ACA Vizcaino waived opening statements and Attorney Rind reserved opening statements.

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

David Hernandez, Street Lighting Engineer, City of Miami, Department of Public Works.

Questions were posed by Board Members Cruz, Dames, and Angel-Capo during the testimony of witness David Hernandez.

Prior to the department calling its next witness, Member Dames asked the Chairman if it would be appropriate to move directly to the penalty phase of this hearing.

Chairman de la O responded in the negative. He went on to say that the department has the burden to prove what happened in this case, the employee had not yet been heard by the Board and he has a right to put on his defense, so until all of these things have taken place, the Board could not move to the penalty phase of this hearing. Chairman de la O further stated that although the Board has to follow this process before entering the penalty phase, it appeared that the handwriting was already on the wall.

Attorney Rind asked for a five minute recess.

Following the recess, Attorney Rind stated that she did not think the comments made by Board Members after one witness (David Hernandez) testified who was not an eyewitness as to how the incident began were fair to her client. She went on to say that Mr. Torres definitely has a defense in this case some of which the Board has already heard. Attorney Rind further stated that to make it sound like a weapon was used is a total mischaracterization and even the department would agree that is what the Board would eventually hear. She stated that comments were made by only one witness without hearing opening statements from either side or a defense to what occurred and although she did not think [the hearing] occured in a way [that was fair to her client], Mr. Torres has decided to withdraw his appeal.

Chairman de la O asked Mr. Torres if it is his decision to withdraw his appeal.

Mr. Torres responded in the affirmative.

Chairman de la O asked the department's attorney if she wished to say anything regarding this case.

ACA Vizcaino responded in the negative.

Following discussion, Chairman de la O stated that Mr. Torres' case would be withdrawn and the penalty [40-hour suspension] would stand.

WITHDRAWN : CASE WILL BE REMOVED FROM THE BOARD'S DOCKET.

ADJOURNMENT:

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

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

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

The meeting adjourned at 12:38 p.m. Breaks were taken at 11:00-11:19 a.m., 11:57-12 noon and 12:16-12:36 p.m.

SIGNATURE:

_____

Miguel M. de la O, Chairperson

ATTEST:

_____

Tishria L. Mindingall, Executive Secretary