
Minutes Merit System Board August 31, 2011

Minutes of the Merit System Board, held on Wednesday, August 31, 2011, 12:00 p.m., Tax and License Conference Room – Financial Services, 20 E. 6th Street, Tempe, Arizona.

Board Members Present:

James Foley
Penny Higginbottom
Russ Schoeneman

Staff Present:

Renie Broderick, Human Resources Director and Secretary to the Board
Colleen Pacheco, Human Resources, Staff to the Board
David Park, Assistant City Attorney

Others Present:

Dale Norris, Attorney for Appellant
Jason Giardino, Appellant

Chairman Foley called the meeting to order at 12:04 p.m.

ITEM I – Motion to Adjourn to Executive Session

Motion not made – deferred until the end of the meeting.

ITEM II – Consideration of Meeting Minutes

- A. Motion by Russ Schoeneman to approve the board meeting minutes of August 26, 2011; second by Penny Higginbottom. Motion passed 3-0.
- B. Chairman Foley suggested deferring the consideration of Executive Session minutes until the end of the meeting.

ITEM III – Pre-Hearing Conference regarding Jason Giardino Merit System Board Hearing – and –

ITEM IV – Motion and Board Decisions/Rulings regarding the Pre-Hearing Conference for the Jason Giardino Merit System Board Hearing

At 12:05, Chairman Foley stated that since Mr. Giardino requested a public hearing, this Conference will occur in open session unless he would like to change it to Private at this time. Both Mr. Norris and Mr. Park agreed open session is fine. Mr. Park stated he made the request for this Conference to discuss submitted motions pertaining to this Hearing.

Chairman Foley introduced the Motion submitted by Mr. Park requesting telephonic appearance of one of the witnesses. Mr. Norris submitted a response which did not object, and requested a telephonic appearance of a witness for his case. Chairman Foley asked if there was a motion to discuss this motion, Mr. Schoeneman so moved with Ms. Higginbottom seconding and the Board opened it up for discussion. Mr. Schoeneman asked Mr. Park why this witness was crucial to his case, to which Mr. Park replied that Commander Santos wrote the Part III and made the initial determination to terminate Mr. Giardino's employment. Mr. Schoeneman indicated he generally eschewed telephonic testimony due to the inability to verify who is on the phone. He noted that the Part III was already available. Ms.

Higginbottom stated she agreed, but will defer as Mr. Park says this is crucial to his case. Chairman Foley asked if the Board wished to approve the first motion and it passed 2-1, with Mr. Schoeneman voting nay. Mr. Schoeneman asked Mr. Norris why his witness was crucial, and Mr. Norris stated his was not, and may or may not be called.

Chairman Foley introduced the Motion submitted by Mr. Park to amend his Pre Hearing Statement. Mr. Norris submitted a response asking the Board deny this motion. Chairman Foley asked if there was a motion to discuss this motion, Mr. Schoeneman so moved with Ms. Higginbottom seconding and the Board opened it up for discussion.

Mr. Park stated that the Appellant is presenting a novel defense regarding the source of the citizen's injury which ultimately resulted in Mr. Giardino's termination, and they had never heard anything like this until they received the Appellant's pre-Hearing Statement. He stated that the citizen's injury and resulting claim was due to Mr. Giardino's takedown action and that Mr. Giardino had himself admitted responsibility for this injury in his Part II response to the City. Mr. Park stated that the City was not aware there was a need for expert testimony prior to receiving pre hearing statement, and is why he is asking to add a witness at this time. He stated that a medical/expert opinion of the source of the citizen's injury would be helpful to the Board in this case. Mr. Park states that Mr. Norris wrote in his response that his client has a contractual right for the City not to be able to amend their statement after the deadline given to both parties has passed, but Mr. Park disagrees. Mr. Park states that the MOU Mr. Giardino was covered under at time of employment states that the Police Department can discipline employees under the Personnel Rules and Regulations, in which there is no firm rule that a Prehearing statement can't be altered, rather that there is a process which can and is being followed. He also states that he feels it would be unfair to the other party if one party gave late disclosure on something and the other side had no opportunity to respond to that issue. He also feels that if his motion is approved this encourage employees to come forward with their defense initially, rather than later, and points out this defense has never been brought up before.

Mr. Norris stated that the City was free to make changes to their process up until the time his client had a vested interest in the process, which happened on the day he appealed the termination. He stated that although the City says his client admitted causing the injuries, his client in fact never admitted to this. Mr. Norris stated that he received the victim's medical records on 8/5/11 and instantly realized his client didn't cause those injuries. He stated that the City had opportunity to discuss/investigate the source of injury 3 years ago, but they let their time pass. He wants to call a biomedical engineer (human factors expert) as a witness, as this person's 13 year career is testifying in court how injuries occur. He stated the City shouldn't have been surprised because they have the same records he received. Mr. Norris stated that he felt Mr. Giardino did not cause the citizen's injury, and asks the Board to deny Mr. Park's motion.

Ms. Higginbottom stated that this is crucial information and it would be prejudicial to the case to not allow Mr. Park to bring in a medical opinion, and vice versa. Chairman Foley stated if one party is allowed an additional witness the other side should be as well. Mr. Schoeneman agreed, saying that the City had the responsibility 3 years ago to look into everything, but now it is a matter of fairness to allow them to pursue this. Ms. Higginbottom stated she found no prejudice to Appellant by approving motion. Chairman Foley asked if the Board wished to approve this motion and it passed 3-0. Mr. Norris asked when Mr. Park will disclose the name of his witness to which Mr. Park responded this afternoon. Mr. Norris asked if he could call another witness, to which Mr. Schoeneman told him he may submit a motion to the Board, but it may or may not be heard.

Chairman Foley introduced the Motion submitted by Mr. Norris for additional time for the Hearing, noting that on July 8 he denied a letter requesting more time because he did not have enough information to make a ruling, and this is a reconsideration. Mr. Park did not submit a response to this. Chairman Foley asked if there was a motion to discuss this motion, Mr. Schoeneman so moved with Ms. Higginbottom seconding and the Board opened it up for discussion.

Chairman Foley asked Mr. Park why he didn't respond, Mr. Park stated that because it was not formatted as motion, rather a letter, he did not know how or when to respond. Mr. Park states he feels more time may be more appropriate due to witnesses at the previous Hearing in 2008 not being cross examined but he wanted to know how much time Mr. Norris is requesting. Mr. Norris stated that 9 hours per day is the maximum time parties can be expected to keep their focus. Mr. Schoeneman stated it is important to have definite time limit, and he wants counsel to prepare their case to present in that set time limit. Mr. Norris stated cross examination is the most difficult thing to prepare for, and he cannot definitively tell the Board how much time he will need for cross examine and rebuttal, but he will try to do it in the most succinct way. Mr. Schoeneman asked Mr. Norris how much time he wanted, to which Mr. Norris replied a minimum of 8 hours with the option for additional time if needed. Mr. Park stated that he felt 8 hours is excessive, and 1 or 2 additional hours is fine but 8 hours would be more than doubling the 3.5 hours granted in the Guidelines, and suggested 5 hours. Chairman Foley asked Mr. Norris how many witnesses he has versus the first Hearing, to which Mr. Norris replied 2, possibly 3 more, but several of the original witnesses were not cross examined at all the first time. Mr. Park stated he feels this is about allocating time properly, and he does not believe 2 more witnesses calls for a whole another day of Hearing, however 1 or 2 hours is acceptable.

Mr. Schoeneman stated that he doesn't like hearing one side one day and another side 2 weeks later, he would be scared of losing something, to which Chairman Foley responded that 2 consecutive days is not possible due to scheduling. He stated that he felt additional time is appropriate and 5 hours per side, split into 2 Hearing days is reasonable.

Mr. Schoeneman asked what the time included, to which Ms. Pacheco replied each side has that time for anything having to do with their case, and time the Board questions a witness is not counted against either party. Ms. Higginbottom suggested 5 hours, Chairman Foley agreed. Mr. Norris stated that he was not going to change his case if granted more time; he needs this time to uphold his client's constitutional right to call witnesses. He stated that he did not want to be in a position where he did not ask questions because he was afraid of running out of time. Mr. Schoeneman stated the Board had the right to set limitations. Chairman Foley asked Mr. Norris what would happen if they granted 5 hours total and Mr. Norris was not able to finish, to which he replied he hoped that Board will grant more time on the spot if the Board thinks he hasn't wasted time.

Chairman Foley stated there has always been a set time limit and if the Board is to resolve this issue today there needs to be a definitive time limit. Ms. Higginbottom and Mr. Schoeneman agree. Chairman Foley asked if there is motion to grant Mr. Norris more time? Ms. Higginbottom so moves and Mr. Schoeneman seconds. Chairman Foley asked if the motion includes a specific amount of time, to which Ms. Higginbottom suggests 6 hours, Mr. Schoeneman suggests 5.5 hours after noting witnesses need to be arranged concisely. Ms. Higginbottom agrees with 5.5 hours and moves that the motion passes 3-0 at 12:52pm.

Ms. Pacheco stated for the record that both parties will receive 5.5 hours total for their case, and this does not include any time the Board spends questioning the witnesses.

Chairman Foley introduced the Motion in Limine submitted by Mr. Norris. Mr. Park submitted a response asking the Board to deny the motion. Chairman Foley asked if there was a motion to discuss this motion, Mr. Schoeneman so moved with Ms. Higginbottom seconding and the Board opened it up for discussion.

Mr. Norris wants testimony of several witnesses who contributed to the termination of Mr. Giardino's employment to be prohibited from being brought up in the Hearing, as well as the notice of claim the City received from the citizen who received injuries, allegedly from Mr. Giardino's takedown. He cited several Supreme Court, Arizona Superior Court and Court of Appeals Cases that a government employee has a property interest in his job and the employee has rights, including the right to cross examine witnesses that threaten the employees interest in their job. While hearsay is

allowed, the cases focus on the reliability of witnesses, and he states that these witnesses were not reliable; they were biased against Police Officers, a convicted felon, drunk, and friends with someone who financially gained from this incident. Mr. Norris had tried to contact these people to cross examine them about their testimony, as is his client's right, but they cannot be tracked down. Mr. Norris also stated that he felt their statements were not reliable as there were 12 non- police witnesses that saw this event, and the IA investigator did not contact any of them about this incident, only the people who "complained" about Mr. Giardino. Mr. Norris stated that the City selected the most biased witnesses, and didn't re-interview these people or confront them after the night of the incident. He stated that this does not carry out due process. Mr. Norris stated that the City said that was the information they had to rely on when making a disciplinary decision, but they could have relied on much more information and chose not to. Mr. Norris stated he wanted these people's testimony stricken unless they appeared before the Board in person, and as they cannot be located this is not possible.

Mr. Park stated he thinks Mr. Norris is factually incorrect, that the main witnesses against Mr. Giardino are the City employees who ran the IA investigation and made the decision to terminate his employment. He stated that the City relied entirely on Mr. Giardino's version of the facts and that did not conflict with what the witnesses said. Mr. Park stated that hearsay is universally admitted in Arizona and he feels the Board is sophisticated and experienced enough to hear all evidence at the time of the Hearing and decide at that time if it is reliable. He stated that he did not see a reason for evidence to be excluded until the Board has an opportunity to hear how much the City actually did or did not rely on these witnesses when making their decision.

Ms. Higginbottom asked Mr. Norris how he tried to contact the witnesses, to which Mr. Norris replied, he used every internet resource he had. She asked if the felon was on probation and if Mr. Norris attempted to contact a probation officer, to which Mr. Norris did not know.

Ms. Higginbottom stated she wanted to hear all evidence and make a decision of credibility at the Hearing. Chairman Foley agreed, stating the Board can accept hearsay, and is familiar with the concept of hearsay versus live testimony. Mr. Schoeneman stated at this point the Board cannot decide if the witnesses are reliable or unreliable.

Chairman Foley asked if there is motion to approve Mr. Norris' Motion in Limine, to which Ms. Higginbottom so moved and Mr. Schoeneman seconds. The motion was denied by a vote of 0-3 at 1:11 p.m.

The Board then discussed setting a second day for the Hearing, and a date of September 19, 2011 at 8:00 a.m. was agreed upon. Ms. Pacheco will confirm this date with all parties and send out notices of the Hearing.

ITEM I – Motion to Adjourn to Executive Session (Deferred Earlier in the Meeting)

Motion by Chairman Foley to convene into Executive Session; second by Mr. Schoeneman. Motion passed 3-0. The Board recessed to Executive session at 1:25 p.m.; the meeting was called back to order at 1:26 p.m.

Motion to adjourn by Ms. Higginbottom; second by Mr. Schoeneman. Motion passed 3-0.

The meeting was adjourned at 1:26 p.m.


Renie Broderick
Board Secretary