



**Minutes
Tempe Police Public Safety Personnel
Retirement Board
June 10, 2010**

Minutes of the Tempe Police Public Safety Personnel Retirement Board, held on Thursday, June 10, 2010, 3:00 p.m., Tempe City Hall – Mayor’s Office, 31 E. 5th Street, Tempe, Arizona.

Board Members Present:

Mayor Hugh Hallman
Todd Bailey
Jeff McHenry

Joe Brosius
James Foley

Staff Present:

Jan Hort, City Clerk
Lourdes Robertson, Human Resources

Brigitta Kuiper, Asst. City Clerk
Lynna Soller, Human Resources

Applicants/Counsel Present:

David Niederdeppe, Attorney for the Board
Cynthia Kelley, Attorney for the Board
David Colborn, Applicant

Dale Norris, Attorney for Katherine Welker
Kathrine Welker, Applicant

Mayor Hallman called the meeting to order at 3:11 p.m.

ITEM I – Consideration of Meeting Minutes

Motion by Jeff McHenry to approve the minutes of May 6, 2010 and executive minutes of March 4, 2010. Second by Joe Brosius. Motion passed unanimously.

ITEM III – Retirement Applications

Motion by Jeff McHenry to approve the application of **Richard Tabor (Normal Retirement)**. Second by Joe Brosius. Motion passed unanimously.

ITEM II – Motion to Adjourn to Executive Session, if necessary

Motion by Mr. McHenry to adjourn to Executive Session Second by Joe Brosius; motion passed unanimously.

ITEM IV – Disability Retirement Hearing Continuation – David Colborn, Jr.

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Meeting reconvened at 3:45 pm in the 3rd floor conference room adjacent to the Mayor’s Office to accommodate the unanticipated number of public attendees.
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The hearing was continued from the May 6, 2010 meeting. The applicant had been notified that the board continued the hearing because they could not determine a permanently disabled with the information provided. Mr. Colborn

submitted further documentation to the Board. During the previous hearing, the board did not direct that an independent medical examiner be appointed pending sufficient information.

Jeff McHenry asked Mr. Colborn to explain his situation to the board members since two of the members were not present for the last meeting.

Mr. Colborn stated that in June 2006 while working with SWAT he was issuing a search warrant. He was breaching a door with a ram when the injury occurred. After many attempts to get the door open, he felt a pop in his back followed by pain. He informed Sgt. Gage at the time. He went to the doctor a few days later and was told that it was a muscle pull. Two months later, following a foot pursuit, after tackling the guy to the ground, he had no feeling in his left leg. He went to the doctor again and got an MRI which showed he had two herniated discs. He had surgery in June 2007 to correct it. Six months after returning to work his back pain got increasingly worse. In September 2009 he had a spinal fusion to alleviate chronic back pain. He still has chronic pain and is going to rehabilitation.

Mr. McHenry pointed out that when the board first received his application packet it showed that the date of application was April 22, 2010. The last doctor's report included in the packet was dated December 4th, 2009 in which the assessment states that the patient is clinically improved. The additional information supplied shows a date after the actual application. He asked what kind of treatment or medication has Mr. Colborn had since the last doctor's note given to the board was from December, 2009.

Mr. Colborn stated that he sees his surgeon every one and a half to two months and sees a specialist every month and that is the doctor that prescribes his medication. He also goes to physical therapy, but has not had any other surgeries since the last date given. In Dr. Kelley's office, Mr. Colborn sees multiple people - all within the practice.

Mr. McHenry asked that the notes dictated by the doctor be clarified. Mayor Hallman questioned Mr. Colborn in regards to the statements made in the records regarding the patient's need to being weaned off of his medications. Mr. Colborn explained that he was currently on several medications, including oxycotin, oxycodone, ambien, and a muscle relaxer. Also, it was noted by Mayor Hallman that the records indicate that Mr. Colborn was unable to raise his leg. Mr. Colborn confirmed that he was unable to perform a leg extension with his left leg.

Mr. Colborn confirmed that he was waiving medical confidentiality to allow discussions of his medical condition in a public hearing.

Todd Bailey asked if Mr. Colborn had any previous back injuries before this incident occurred.

Mr. Colborn stated that no, he has never had any other back problems.

Mr. Brosius made a motion to send Mr. Colborn to a doctor that the Board selects in order to obtain an independent medical opinion. Second by Mr. Bailey. Motion passed unanimously.

The referral will be handled by Mr. McHenry who will work with the applicant to obtain the medical review.

ITEM V – Rehearing of Survivor Benefits Application

Mayor Hallman reviewed this item saying that at the original hearing the Board voted 4-1 to award disability benefits to Kathrine Welker. A request for rehearing was made under section 15 of the rules.

Mayor Hallman discussed his view on what it means in the statute for disability that the injury was, or the death was, a direct and proximate result from the injury as a result of the public safety duties. It is reasonably foreseeable under a tort standard as well as the definition from the dictionary. Mayor Hallman views it as both a direct and proximate result under any view of the standard tort case and that this is an obvious result of someone that was suffering from

this sort of injury. In this instance, an officer was injured and began a regimen of treatment. The question that one would have is: is it both reasonably foreseeable under a tort standard and even under a definition, using a definition that might come from the typical dictionary. Of proximate in terms of 'time' and the likelihood of following from the incident in a sufficiently short period of time, is a direct line essentially from the incident. And given what had occurred to the officer (the injuries sustained and the prescriptions that were provided to him) Mayor. Hallman felt that, although the period of time may seem long to some, the connection between his injury and the ultimate death is pretty clear. If one had the choice of living for decades or living for three years, three years would seem like an awfully short period of time to select. So, it is relative in this instance. He viewed it as both a direct and proximate result under any view of the standard as put forth in tort cases under Arizona law and an obvious and potentially likely result from someone suffering the kind of injury that Russell Welker suffered. Under either standard, the facts support awarding the death benefits.

Mr. McHenry agreed with the Mayor. How the Board applies the laws to the standard and the facts given shows that proximate and direct from a tort point of view meets the definition.

Mr. Brosius concurred that is obvious to him under both the tort standard as well as the strict definition.

Mr. Foley agreed that under either standard (tort or definition) this would qualify.

Mr. McHenry made a motion to approve the survivor benefits to Kathrine Welker. Second by Joe Brosius. Motion passed 4-1 with Todd Bailey voting no.

Mr. Niederdeppe noted that there have been no benefits paid at this point. His understanding is that, upon the action of the Board, the Fund Manager would implement the Board's direction. Mr. Norris's understanding was that, under the Administrative Procedures Act, the Fund Manager would need to obtain some type of preliminary injunction from the Superior Court. At this point, they would be required to pay the benefits, unless they obtain some order.

ITEM VI – Update Status of Tranter Litigation

Mr. Niederdeppe supplied the Board with a copy of the plaintiff's Opening Brief and the Board's Responsive Brief filed on the 27th of May. The plaintiff will have the opportunity to submit a Reply Brief. If and when a Reply Brief is filed, Mr. Niederdeppe will get a copy to the Clerk for the upcoming board meeting.

James Foley made a motion to adjourn. Second by Jeff McHenry. Motion passed unanimously.

The meeting was adjourned at 4:05 p.m.

Minutes prepared by: Jaclyn Levin

Jan Hort
City Clerk