

**MAYOR AND COMMISSIONERS MEETING
CITY OF REHOBOTH BEACH**

January 10, 2011

The Special Meeting of the Mayor and Commissioners of the City of Rehoboth Beach was called to order at 1:30 p.m. by Mayor Samuel R. Cooper on Monday, January 10, 2011 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

ROLL CALL

Present: Commissioner Pat Coluzzi
 Mayor Samuel R. Cooper
 Commissioner Dennis Barbour
 Commissioner Stan Mills

Absent: Commissioner Bill Sargent
 Commissioner Kathy McGuiness
 Commissioner Lorraine Zellers

Also in attendance were: City Manager Gregory Ferrese
 Mr. David Williams, Esq., Counsel to the City Manager
 City Solicitor Glenn Mandalas

The purpose of this Special Meeting was to hear and decide, in accordance with the Public Employment Relations Board's June 24, 2010 decision, an appeal of the City Manager's decision regarding a grievance filed by General Teamsters Local Union 326, such decision dated March 30, 2009 and appeal filed on April 3, 2009. Note: General Teamsters Local Union 326 has requested the public hearing. In accordance with 29 Del.C §10004(b)(8) and the contract between the City and General Teamsters Local Union 326, some or all of the hearing portion of this meeting may be conducted in public session or executive session closed to the public.

City Solicitor Glenn Mandalas noted that Mr. Michael Ciabattoni of General Teamsters Local Union 326 on behalf of Corporal Tyler Whitman had requested this appeal hearing be held in an open public session. This matter relates back to February 4, 2009 when Corporal Whitman was suspended without pay for 56 hours. After that a grievance was filed by General Teamster Local Union 326. The shop steward, Sergeant Scott O'Bier requested that the grievance be made whole for lost wages, benefits and fringe benefits. Police Chief Keith Banks did not change his decision in response to the grievance, and City Manager Gregory Ferrese reviewed and affirmed Chief Banks' decision. Thereafter, the General Teamster Local Union 326 Vice President Michael Ciabattoni requested an appeal hearing before the Mayor and Commissioners as provided in the collective bargaining agreement. That appeal was conducted on May 15, 2009. At that time, the Mayor and Commissioners concluded that they did not have subject matter jurisdiction because the action was not disciplinary in nature, so it was a complaint rather than a grievance. Under the collective bargaining agreement, the complaint procedure would stop at the City Manager's decision and would not come before this body. On July 13, 2009, the union filed an unfair labor practice action with the Public Employment Relations Board questioning that decision of the Mayor and Commissioners. The Public Employment Relations Board administrator remanded the matter back to the Mayor and Commissioners for a Step 3 decision under Article 9 of the collective bargaining agreement. That would be for a decision on the merits of this grievance action. On November 23, 2010, the union filed a request for enforcement of the Executive Director's January 13, 2010 decision. On March 4, 2010 that request was denied by the Public Employment Relations Board Executive Director. On March 9, 2010, the union appealed the decision to the Public Employment Relations Board, and on April 21, 2010, the Public Employment Relations Board held a hearing. The result of that hearing was a written opinion on June 24, 2010. In that written opinion, the Employment Relation Board denied the union's appeal and affirmed the decision of the Executive Director dismissing the Teamsters' request that the City be compelled to conduct a new full evidentiary hearing on Corporal Whitman's grievance. The Public Employment Relations Board did remand to the Mayor and Commissioners for a decision on its merits as required by Article 9.6 under the collective bargaining agreement. Since there has been a fair amount of time passed since the June 24, 2010 decision, a decision has been made to conduct a new full evidentiary hearing. The purpose of today's Special Meeting is to conduct a full evidentiary hearing and make a decision on Step 3 of the grievance procedure. The legal standard to be applied today is found in Section 7.1 of the collective bargaining agreement. Under Section 7.1, the City may as provided for in other articles of this agreement,

discipline employees for just cause as established by substantial evidence. The City has the burden of proof to demonstrate just cause. City Solicitor Mandalas presented the procedures for the hearing.

Mr. Dave Williams, Esq., representative of City Manager Gregory Ferrese, provided an opening statement. He did not believe that the issue here is whether there was just cause for discipline. The issue is whether there was discipline. If it is determined that Corporal Whitman was disciplined, there was a violation of Article 7, and the City will concede that because the Chief of Police did not adhere to the various steps set forth in Article 7. In the January 13, 2010 decision of the Executive Secretary, it was stated that if the suspension did not constitute discipline as defined in the agreement, the grievance is denied. If it did, then Article 7 should be applied and the suspension evaluated there-under. In this case, it was not a disciplinary action either by the common sense and ordinary meaning of the word "discipline" or by the way the collective bargaining agreement defines it. The Executive Director in that decision said that the underlying facts in the case were undisputed, and the City believes the material facts are undisputed.

Mr. Michael Ciabattoni, Vice President of Teamsters Local Union 326, representative of Corporal Tyler Whitman, provided an opening statement. Mr. Ciabattoni agreed that this is a simple case, but he disagreed with how the issue was framed. This case has been remanded to the Mayor and Commissioners based on its merits and based on Article 7.14 of the collective bargaining agreement which defines how a situation like this is to be handled. Corporal Whitman was suspended, and it was a disciplinary suspension based on the fact that his sidearm, badge and credentials were taken from him, and he was escorted from the building. Focus needs to be put on the merits of the case including just cause and the violation of procedure done under the contract.

Attorney Williams introduced an index of the City's exhibits:

- City Exhibit 1 – Memorandum dated 1/29/08 was removed and is not being offered.
- City Exhibit 2 – Protection From Abuse Order dated 2/3/09.
- City Exhibit 3 – Weapon Relinquishment Follow Up dated 2/3/09.
- City Exhibit 4 – Memorandum from Chief Banks to Corporal Whitman dated 2/4/09.
- City Exhibit 5 – Notification of Suspension dated 2/4/09.
- City Exhibit 6 – Revocation of Police Powers dated 2/3/09.
- City Exhibit 7 – Protest Letter dated 2/4/09.
- City Exhibit 8 – Report of Grievance dated 2/10/09.
- City Exhibit 9 – Grievance Decision dated 2/11/09.
- City Exhibit 10 – Subpoena dated 2/13/09.
- City Exhibit 11 – Notice of Restoration of Police Powers dated 2/15/09.
- City Exhibit 12 – Police Department Schedule dated February.
- City Exhibit 13 – Grievance Decision dated 3/30/09.
- City Exhibit 14 – Grievance Appeal dated 4/3/09.
- City Exhibit 15 – Agreement – Articles 7 & 9 dated 4/1/07 – 3/31/10.
- City Exhibit 16 – PERB Decision dated 1/13/10.
- City Exhibit 17 – PERB Decision dated 3/4/10.
- City Exhibit 18 – PERB Decision dated 6/24/10.

Attorney Williams called Police Chief Keith Banks as a witness. Chief Banks was sworn in and provided oral testimony regarding full-time officers, seasonal officers, levels of training and levels of compensation, etc. Chief Banks verified City Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15.

Mr. Ciabattoni questioned Chief Banks in regard to his testimony about events that took place at that time and his decision regarding this matter.

Mr. Ciabattoni introduced the Whitman exhibits:

- Whitman Exhibit 1 – Memorandum from Chief Banks to Corporal R. Tyler Whitman dated January 29, 2008.
- Whitman Exhibit 2 – Definition from Wikipedia of "Ex parte".
- Whitman Exhibit 3 – Title 13. Domestic Relations. Part D. Protection From Abuse Proceedings. Section 1043. Ex parte orders and emergency hearings.

Mr. Ciabattoni requested a recess from the hearing at 2:45. The hearing was reconvened at 2:50 p.m.

Mr. Ciabattoni called Sergeant Scott O'Bier as a witness. Sergeant O'Bier was sworn in and provided oral testimony regarding events that took place at that time, his position as shift supervisor and assistant shop steward, and collective bargaining agreements.

Attorney Williams questioned Sergeant O'Bier in regard to his testimony about advice he had given Corporal Whitman and events that took place at that time.

A closing statement was provided by Attorney Williams. The facts are not in dispute. The order was issued, and the City did not have anything to do with causing it to issue and had no control over what it was required to do once the order did issue. The only question before the Commissioners is whether discipline was administered. Essentially, the union has argued that unless there is something in the collective bargaining agreement that talks about what the City may or may not do by way of a non-disciplinary suspension, then somehow that means what occurred here falls under Article 7. The only thing the City negotiated was how discipline would be handled. In Article 1.4, Management Rights, of the collective bargaining agreement, it says in part that the union recognizes the City's right to manage its operations effectively and efficiently in the interest of all concerned. The City retains the right to manage including the adoption of rules and regulations so long as the City refrains from taking action inconsistent with this agreement. This is a typical formulation of a management rights provision that gives the City the right to manage. If there was discipline administered, Chief Banks, the City and the Police Department violated Article 7. Steps in Article 7 were not followed for the simple reason that it was not disciplinary. The suspension was a result of the fact that Corporal Whitman lost his ability to carry his firearm which was essential. It is one of the core essential requirements of being able to perform his job. This case is about a refusal to accept responsibility for what occurred. The City had no control over what happened, and the City reacted to it as it must. As soon as it was lifted, the City restored him as it should.

A closing statement was provided by Mr. Ciabattoni. It is not the City's fault, but it still needed to adhere to the contract. The City had no control of the situation, and neither did Corporal Whitman. Corporal Whitman's wife works in Family Court and used the system to retaliate against him for simply doing what he was advised to do by Chief Banks and Sergeant O'Bier. There is no reference to a non-disciplinary suspension anywhere in the collective bargaining agreement. Suspension is a punishment, and it is disciplinary. As to just cause, there was no willful, want nor reckless action by Corporal Whitman at all. He merely followed procedures as directed to him by his Sergeant and Chief. The City makes mention that it was doing what it was required to do by the courts; however, nowhere in the ex parte order does it say that Corporal Whitman was to be put off work and have his badge and credentials taken, and then be removed from the building. The ex parte order said that he had to surrender all firearms in his possession. It did not say he had to be suspended. A non-disciplinary suspension or trying to frame something as a non-disciplinary suspension is inconsistent with the agreement. The controlling article is Article 7. Corporal Whitman was a victim and he was suspended unjustly. He should have been put off with pay pending a hearing. In conclusion of that hearing, the binding determination would have been made. The contract was not followed and there was no just cause. The City violated the contract repeatedly through this process. Mr. Ciabattoni said that he would like to see Corporal Whitman be made whole for all lost wages, benefits, fringe benefits as well as interest on top of the back pay amount.

Commissioner Stan Mills made a motion, seconded by Commissioner Pat Coluzzi, to table this matter to a future meeting and to move to Executive Session at 3:17 p.m. to consult with City Solicitor Mandalas. Motion carried unanimously.

Commissioner Mills made a motion, seconded by Commissioner Coluzzi, to reconvene to the public forum of the Special Meeting at 4:03 p.m. Motion carried unanimously.

There being no further business, Mayor Cooper declared the meeting adjourned at 4:04 p.m.

Respectfully submitted,

(Ann M. Womack, Assistant Secretary)