

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

December 6, 2010

The Special Meeting of the Mayor and Commissioners of the City of Rehoboth Beach was called to order at 1:05 p.m. by Mayor Samuel R. Cooper on Monday, December 6, 2010 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

ROLL CALL

Present:	Commissioner	Bill Sargent
	Commissioner	Pat Coluzzi
	Commissioner	Kathy McGuiness
	Mayor	Samuel R. Cooper
	Commissioner	Dennis Barbour
	Commissioner	Stan Mills
	Commissioner	Lorraine Zellers

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

The purpose of this Special Meeting was to hear and decide an appeal of the City Manager's determination to issue an intent to terminate notice to a regular employee where the employee has filed a timely appeal in accordance with Section 46-10(E) of the City Code. This appeal is being referred to as No. 1210-01. Note: In accordance with 29 Del.C §10004(b)(8) the hearing portion of this meeting will be conducted in open session.

City Solicitor Glenn Mandalas noted that this is a personnel matter and under the Freedom of Information Act, issues related to personnel are conducted in Executive Session. City Solicitor Mandalas had spoken with Mr. John Brisco yesterday, and he had expressed interest in having this appeal hearing in an open public session.

Mr. John Brisco acknowledged that it was his desire to be heard in open session, and he was aware that minutes of this hearing would be published and available to the public for inspection.

City Solicitor Mandalas noted that on October 7, 2010, Mr. Brisco was provided with formal notice by City Manager Gregory Ferrese of his intent to terminate Mr. Brisco's employment with the City effective October 7, 2010. Mr. Brisco was advised of his right to appeal Mr. Ferrese's decision to the Board of Commissioners under Section 46-10(E) of the City Code. Mr. Brisco had exercised his appeal option by letter dated October 12, 2010. City Solicitor Mandalas noted that this meeting today is being held on the purposes of conducting a hearing under Section 46-10(E) to review Mr. Ferrese's October 7, 2010 decision. He read Section 46-10(E) of the City Code. The legal standard set out in Section 46-10(E) that the Board of Commissioners will be applying today is whether Mr. Ferrese's decision is supported by a preponderance of the evidence. City Solicitor Mandalas presented the procedures for the hearing.

Mr. David Williams, Esq., representative of Mr. Ferrese, raised a procedural issue that this incident involved Mr. Brisco and involved the conduct of other employees. During the course of presenting the case, the Commissioners may hear that other employees were also disciplined. While Mr. Brisco has a right to waive his privacy interest, Attorney Williams did not think that he has a right to waive the privacy rights of other employees. To the extent that there are such references at least from the City Manager's side, they will try to avoid identifying people by name. If people are identified by name, more specifically other employees who were also disciplined, Attorney Williams suggested that that portion of the record should not become part of the public record. City Solicitor Mandalas agreed, and he had discussed this with Mayor Cooper.

Attorney Williams provided an opening statement. What the Commissioners will learn is that the essential facts are not in dispute. This incident involved a situation where a sanitary sewer line was being replaced in the City in May 2010. During the course of that project, it was discovered that a water line was leaking, so a change order was issued and the contractor, Teal Construction, was also asked to replace the water line while excavation and work were underway. The contract that the City had with Teal Construction provided that any items which were removed in terms of pipe, etc. were the property of Teal Construction, and it was Teal Construction's obligation to remove those items from the site. The Commissioners will also hear that

Mr. Brisco approached a Teal Construction employee after the water pipe was removed and was already on a Teal Construction vehicle, and he asked about that pipe. The Teal employee indicated that Teal Construction was going to haul it offsite, and there was an expense associated with doing that. Mr. Brisco convinced the Teal employee to drop the pipe off at the City facility where Mr. Brisco worked, which occurred. Mr. Brisco enlisted the assistance of another employee to break up the pipe with a City backhoe, load it on a City of Rehoboth vehicle, and Mr. Brisco drove the vehicle to a salvage yard in Georgetown, DE and received \$738.00 for the pipe. He bought some food that he shared with some of his colleagues back at the Rehoboth worksite and also shared some portion of the \$738.00 with three other employees, and kept the balance for himself. It will also be clear to the Commissioners that all of this took place during the work hours, during the time that the City was paying Mr. Brisco to perform services for the City of Rehoboth. The Commissioners will hear that the City Manager asked Corporal Sweet to conduct an investigation. During the investigation that was conducted, Mr. Brisco apparently thought that the pipe did not belong to the City. The problem is that Mr. Brisco missed the point, the point being the use of City time and City equipment to generate a personal gain. It is the City Manager's conclusion and position that this amounts to a form of theft. This is a straightforward case from the standpoint of the facts.

Mr. Brisco provided his opening statement. He thought that Teal Construction was taking the pipe for its use when the City had it right here for its use. He asked another employee what was going to be done with the pipe. One of the bosses said he gave it to Teal Construction. Mr. Brisco had asked why the pipe was not given to the City's employees. They would take it back to the scrap yard. Mr. Brisco asked to have the pipe given to them because they could use it here. The other employee said that they could take the pipe down there and break it up. Mr. Brisco said that he could not put the pipe on his truck because it was too big. The other employee said that he would load the pipe on Truck 39, and he asked Mr. Brisco if he would take it to Georgetown. Mr. Brisco said that he takes trash over to A.P. Croll anyway, and he would take the pipe over to Donovan's. He got permission from one employee to take the truck because he does not take anything unless he gets permission. The employee told Mr. Brisco where the key was, to take Truck 39 and bring it back down there, and they would break up the pipe and put it on the truck. It takes an hour and a half to go to Donovan's and come back, and it was not like stealing time. Mr. Brisco said that if it was the City's pipe, he would never have touched it. Mr. Brisco said that he had approached one of the drivers and one of the other employees, and asked where they wanted the pipe. The employee said to take it down to the City's place. Mr. Brisco said that all he did was drive the truck.

Attorney Williams presented the City Manager's case and exhibits.

- Exhibit 1. City Solicitor's notification to Mr. Brisco of today's hearing.
- Exhibit 2. Notice of intent to terminate.
- Exhibit 3. Request for a hearing.
- Exhibit 4. Summary that Corporal Sweet had prepared following his investigation.
- Exhibit 5. Receipt from the salvage yard indicating that there was \$738.00 payment made to Mr. Brisco.
- Exhibit 6. Records of when certain employees including Mr. Brisco punched in and out of work on that day.

Attorney Williams called Corporal Sweet as their first witness. Corporal Sweet was sworn in by City Solicitor Mandalas. Corporal Sweet confirmed that the City Manager had requested him to conduct an investigation of the incident. It was brought to Corporal Sweet's attention by the City Manager, Mr. Ferrese, around September 7, 2010. In reference to Exhibit 4, Corporal Sweet confirmed the summary of the investigation that was conducted was correct. Corporal Sweet briefly told the Commissioners how he went about the investigation and what steps he took. Corporal Sweet said that initially he had spoken with the people surrounding the incident and he began with Department Heads Bob Stenger and Bill Woods. He spoke with them about what the day-to-day operations were, how the employees went about their business, and the level of supervision that is received or enforced during the day. That would determine whether or not Mr. Brisco et al actually were operating under strict guidelines, or whether or not they had the authority to go do what they needed to do. In that initial portion of the interviews, Corporal Sweet was basically told these particular employees are free and autonomous to do whatever they need to do during the course of their duties. They are not specifically supervised. These employees are given certain tasks during the course of the day and as long as those tasks are completed, there is no accounting for their time during the course of the day. They may be tasked with four hours of work and if the four hours of work is done, then the other four hours remaining in the day is unchecked or certainly not documented or accounted for. Corporal Sweet then spoke with Teal Construction to determine what the nature of the property was. Initially, the thoughts were that the pipe had belonged to the City. Corporal Sweet contacted Teal Construction, and it was determined that Teal's

responsibility was to remove any by-products of the jobsite to include the piping that would have been involved or any concrete, asphalt, debris and other matter. Corporal Sweet asked Teal Construction whether or not it would be in the realm of possibility to them to want to turn that piping over to somebody else, and they expressed it as yes because Teal Construction would incur a cost for renting a truck to load, remove and unload this pipe and in selling it for scrap. If somebody had asked for the pipe, Teal Construction most certainly would have given it to them. This gave some credibility to the fact that the pipe ownership was not in question and that it could have been obtained legitimately by anybody seeking it, which in this case was Mr. Brisco. Once Corporal Sweet had established that the City was no longer dealing with a theft case, it actually moved from what he would consider a criminal matter to an administrative matter. Corporal Sweet's avenue of investigation changed from a police side to just interviews of the departments involved to a fact finding event. Corporal Sweet confirmed that Mr. Brisco was among the individuals interviewed, and he spoke with Mr. Brisco on two separate occasions. Corporal Sweet confirmed that he was able to determine what ultimately happened to the pipe and where it went. The pipe was actually taken to Donovan's Salvage in Georgetown, DE. Corporal Sweet spoke with an employee, Ms. Lorie Hastings, who advised him that she had issued a receipt ticket signed out to Mr. John Brisco. In regard to Tab 5, Corporal Sweet confirmed that he had asked Donovan's to send the ticket to him which had been faxed. The ticket was signed by Mr. Brisco. Corporal Sweet confirmed that the ticket indicates that it appears to say paid cash. Corporal Sweet confirmed that it was his understanding the \$738.00 in cash was handed over to Mr. Brisco. Corporal Sweet said the person at Teal Construction actually was not aware that the pipe had been dropped off at a City facility. In his interviews with City employees, they have confirmed that it was taken back to the City wastewater yard. Corporal Sweet confirmed that he had talked with some of the supervisors, including Mr. Brisco. None of the supervisors he had spoken to appeared to have knowledge of these events, and none were aware either of the pipe being brought back or of its removal from the yard. Corporal Sweet confirmed that no supervisor authorized this activity to take place. Regarding when Corporal Sweet interviewed Mr. Brisco and the others, he explained to each employee that an administrative investigation was taking place and that Mr. Ferrese had asked him to determine what was going on. Corporal Sweet only gave them instructions that they were not to discuss this with others. Corporal Sweet said that he had hoped the employees were telling him the truth. Corporal Sweet confirmed that September 10, 2010 was the date that he had interviewed Mr. Brisco. Corporal Sweet confirmed that in regard to his report, Mr. Brisco had indicated that he was the one who inquired of someone who worked for Teal Construction what was going to happen to the pipe. Corporal Sweet confirmed that Mr. Brisco had told him that another employee broke up the pipe. Corporal Sweet confirmed that it was his understanding that the backhoe which was used to break up the pipe was a City backhoe. Corporal Sweet confirmed that it was a City truck belonging to or under the care of the Water Department that the pipe was loaded on. Corporal Sweet confirmed that Mr. Brisco had told him that he drove the truck to Donovan's in Georgetown, DE. Corporal Sweet said that Mr. Brisco may have told him that he was going to go there anyway at that time. The recorded video would have that particular notation. He could not recall directly. Corporal Sweet confirmed that Mr. Brisco had told him that he got the cash and returned, bought some food that he shared with certain other employees, and that he also shared some of the proceeds of the \$738.00 with three other employees. Corporal Sweet confirmed that Mr. Brisco believed he had done nothing wrong since the pipe was given to him. Corporal Sweet confirmed that no other employees he had interviewed had said anything really contradictive with what Mr. Brisco had told him.

Mr. Brisco exercised his right to cross-examine Corporal Sweet. He said that it is important that Corporal Sweet said that one of the employees is lying. Corporal Sweet said that he did not believe that any of the stories were inconsistent. Corporal Sweet believed Mr. Brisco had said that he asked Teal Construction where they were going to be taking this pipe, and when they said they were going to haul it away, Mr. Brisco had said no, give to us. Mr. Brisco asked Corporal Sweet if Mr. Brisco had told him there was another employee with him. Corporal Sweet said that he could not recall specifically which other employee may have said that there was another employee with Mr. Brisco. There were three other employees involved. Yes, it is possible that Mr. Brisco had said that there was another employee present with him when this happened.

No questions were redirected.

Corporal Sweet was excused.

City Manager Gregory Ferrese was sworn in by City Solicitor Mandalas.

Attorney Williams called City Manager Gregory Ferrese to provide testimony. Mr. Ferrese confirmed that he had requested Corporal Sweet conduct an investigation. Mr. Ferrese confirmed that Corporal Sweet had video and audio taped each of the investigative interviews. Mr. Ferrese confirmed that he had reviewed all of those tapes before he made a determination. In regard to the three other employees involved including one employee who provided assistance to the point of using a backhoe to break up the pipe and load it on to a City

vehicle, Mr. Ferrese said that the employee who loaded the pipe was disciplined three days without pay. The other two employees who accepted the money were disciplined one day without pay. With respect to distinguishing the discipline imposed in Mr. Brisco's case as compared to the other three employees, Mr. Ferrese said that he had an investigation done by the police department; and he read the investigative report done by the police officer. Mr. Ferrese also looked at the video of when the other employees were interviewed, and he determined that Mr. Brisco took it upon himself with the assistance of another employee, to bust up the pipe, load it on a City vehicle, use City equipment, haul it to Donovan's and then kept the \$738.00. Mr. Brisco kept most of the money and distributed some of the money among the other employees. Mr. Ferrese felt that this was a serious violation, and he made the decision to terminate Mr. Brisco. Mr. Ferrese said that he had also asked the lady in charge of payroll to look at the timesheets to determine that this happened during working hours. The timesheets revealed that all the employees were on 7:00 a.m. to 3:00 p.m., and it did happen during City hours. Mr. Brisco was paid by the City, and he was on City time. All of the employees were on City time. Mr. Ferrese confirmed that the printout at Tab 6 was the printout which was requested. Mr. Ferrese confirmed that all the employees punched out at just about 3:00 p.m. which would have been their normal work day.

Mr. Brisco cross-examined Mr. Ferrese. Mr. Brisco asked Mr. Ferrese what he meant by keeping the rest of the money and how much the rest of the money was. Mr. Ferrese said that only Mr. Brisco could tell him that. All Mr. Ferrese knew is that Mr. Brisco was issued \$738.00 in cash, he bought some food with it, and he gave the other three employees a certain amount of money. Mr. Brisco said that when he came back, he gave the three employees the other money and the food, and he wound up with \$90.00. Mr. Brisco asked Mr. Ferrese how doing this was for his own personal use. Mr. Brisco said that he went over to pick up Truck 39 because he was told to do so and take the pipe back to the dump, and they would break up the pipe and put it on the truck. Mr. Brisco was asked if he would take the pipe over to Donovan's. He drove the truck over there. Mr. Brisco said that Mr. Ferrese is saying that he pocketed the rest of the money, when the other employees got more than he got.

Commissioner Sargent asked if there is an explanation why such a long time went on after the May 25, 2010 incident and what triggered the investigation four months later on September 7, 2010. Mr. Ferrese said that it was brought to his attention the last week of August or the first week of September 2010 by another employee advising him what had occurred. When Mr. Ferrese found out what had occurred, he then turned it over to the Police Chief who then directed the investigation with his police officer. Commissioner Sargent asked Mr. Ferrese if the employee who brought this forward had a grudge to bear or if that person was being a loyal employee of the City. Mr. Ferrese said that he had appreciated the employee bringing this to his attention. He was not aware of any grudge.

Commissioner Barbour asked if the City or Mr. Ferrese knew what the disposition of the funds was in terms of the \$738.00. Mr. Ferrese said that one employee stated he had received close to \$100.00 out of the \$738.00. Another employee stated that he received some money from Mr. Brisco and the same with the third employee. Only one employee gave a rough idea of the amount he received. Mr. Ferrese did not know how the money was divided up.

Commissioner Mills made a motion, seconded by Commissioner Sargent, that the Commissioners enter into Executive Session to discuss a personnel matter at 1:45 p.m. Motion carried unanimously.

Commissioner Mills made a motion, seconded by Commissioner Sargent to reconvene to the public forum at 2:48 p.m. Motion carried unanimously.

Commissioner Barbour made a motion, seconded by Commissioner McGuinness that the decision of the City Manager, appeal no. 1210-01 be reversed. (Zellers – aye. The findings of fact were correct. The termination was extreme in lieu of what the other employees received. Mills – aye. Preponderance of the evidence showed and confirmed that infractions were made; however, there should be consideration as to whether or not the punishment fit the crime. His hesitation on affirming the decision was because others were involved and implicated in this. Barbour – no. Sargent – aye. It was a very unfortunate situation and a lot of things happened that should not have happened. He was extremely concerned that there be equity and that if there is a sense throughout the community that we have not been equitable, he thought that a far greater harm would be done. He hoped that this will lead to some improvised actions. Coluzzi – aye. McGuinness – aye. She agreed with all the previous statements wholeheartedly from the other Commissioners. Cooper – He found it very difficult. It was very unfortunate that this happened, and it was wrong. He did not know, at this point, everybody's position in what they did. Unfortunately, he was different than the other Commissioners because the preponderance of the evidence said that the person in this case was guilty of an infraction, and termination was probably appropriate for it. He was troubled that some of the others who seemed to have a bigger role were

not disciplined more harshly.) Motion carried and the action taken by the City Manager was reversed.

There being no further business, Mayor Cooper declared the meeting adjourned at 2:54 p.m.

Respectfully submitted,

(Kathy McGuinness, Secretary)