

MINUTES
Open Meeting

December 2, 2019

Commission Members Present:
John Fink, Chairman
David Freund
Paul Rubin

Also Present Were:

Mr. Barry Corey	Counsel for the Commission/Council
Dan Jurkowitz	Deputy County Attorney for the Respondent
Laureen Pew	Paralegal, Pima County Attorney's Office
Mike Storie	Attorney for the Appellants
Jesus Silva	Appellant
Jaime Silva	Appellant
Aurora Hernandez	MSC Recording Secretary

The Open Meeting of the Pima County Merit System Commission was called to order by John Fink, Chair, at 9:12 a.m. Roll call was taken and there was a quorum present. All persons in attendance were asked to state their names for the record. The Pledge was led by Chairman Fink.

Item C. Appeal Hearings

Discussion and Action: **Jurisdictional Appeal Hearings**

*Jesus Silva V Pima County Sheriff's Department
Jaime Silva V Pima County Sheriff's Department*

*Discussion and possible action of the
appointment of a Hearing Officer for the
disciplinary appeal of Mr. Faas V Facilities
Management*

Mr. Fink, Chair, asked if everyone agreed to hear both the appeals together since they were for the same issue. Everyone was in agreement and Mr. Fink read the opening statement into the record.

He asked if either party wished to invoke the Rule of Privilege. The Rule of Privilege was explained by Mr. Corey, and was not invoked by either party. Mr. Fink asked all parties if they had any preliminary matters they wished to discuss, there were none.

Mr. Jurkowitz, Attorney for the Respondent waived his Opening Statement, at this time.

Mr. Storie, Attorney for the Appellants, made his opening statement.

These are appeals for an issue where the Appellants were placed on *Administrative Suspension without Pay* while a criminal investigation is in progress.

Mr. Storie stated there is no notice to either of the Appellants as to the time frame for the Suspension, they have now been suspended without pay for two months, without the ability to get another job. If this goes on for another few months the back pay award will be enormous. He would like to get this moving and get PCSD to make a decision and he can continue with the Appeal process.

Mr. Jurkowitz made an opening statement. He explained how *Administrative Suspension without Pay*, provided by the MSC Rules, is issued during an ongoing investigation where there is an indication of possible criminal findings, and the County is not paying someone to sit at home who has committed a crime.

He indicated there is no reason for this Hearing since both the Appellants filings were well over the 10 day deadline for appealing, which was indicated on their Notices. They were advised by Mr. Storie not to appeal at that time, which was their choice.

Jesus Silva was served on October 4, and did not file until October 25 which is 21 days overdue. Jaime Silva was served on October 3, and appealed on October 30, which is 27 calendar days overdue and were both denied by Ms. Bohland, Director, Human Resources, due to both being untimely filed. Mr. Storie requested a hearing on November 12 and failed to copy the County Attorney.

The Commission has the authority to grant a jurisdictional hearing if good cause is shown. Good cause would have to be something such as *"we were hit by a bus and were in the hospital and could not make the deadline to appeal"* there is no justification for the late filing.

This is not discipline. If there is discipline down the road, and if after an appeal there is an award of back pay, they will be made whole.

Mr. Fink asked Mr. Storie to specifically address the issue of the 10 calendar days of the Notice of Appeal. Mr. Storie acknowledged the 10 day limit. This is not equitable, they cannot be left on Administrative Suspension without Pay forever. Mr. Storie will be asking for an Evidentiary Hearing in the near future just to get PCSD to finish up their investigation, or Special Action in Superior Court. He made a strategic decision initially, not to appeal immediately, waiting for a criminal action or criminal indictment.

Mr. Fink asked Mr. Jurkowitz if he had any indication of whether the investigation was still on-going.

Mr. Jurkowitz, stated he had no idea, and Mr. Storie's statements should not be considered evidence.

Mr. Fink just wanted to know if it had been terminated or not and Mr. Jurkowitz stated he had no knowledge at this time.

Mr. Freund asked, given the time frames Jaime's letter dated October 4 and at the bottom Jaime acknowledged receipt on October 3, how was this possible

Mr. Jurkowitz, speculated it was probably scheduled to be done on the fourth but due to his schedule he signed on the third.

Mr. Freund, it doesn't really make a difference just asking. Since they are not disciplinary actions if the appeals had been filed timely, would they have been able to Appeal?

Mr. Jurkowitz replied yes, absolutely.

Mr. Corey reviewed the wording to the LEMSC and MSC has different rules.

Mr. Rubin, what is the distinction between MSC and LEMSC Rules?

Mr. Corey responded, the issue is revolved around the language of the actual Notice of Suspension and the language of the Rule. The MSC Rule 12.3 states *"an appointing authority may impose a non-disciplinary suspension, without pay or with reduced pay when an employee is charged with a felony or other crime involving moral turpitude."* Or *"being in the best interest of the County while an inquiry is being made as to the conduct of the employee"*. That is a condition of the Rule. The question has been raised if the investigation is ongoing.

The language of the Notice states *"Pursuant to Pima County Merit System Rule 12.3, in the best interest of Pima County, you are being placed on Administrative Suspension without Pay until the resolution of the criminal and Office of Professional Standards (OPS) investigations of which you are the focus."* Both the Notice and the Rule state this will be in effect while the inquiry is going on.

Mr. Stories' point is this could be indefinite or forever. Mr. Jurkowitz point is they are both right we don't have any evidence at this point. You may consider some inquiry as to what the status of that investigation is. Because it seems the language of the letter and the language of the Rule, both require that they be done only during the duration of the investigation. In the absence of a finding.

Mr. Rubin, doesn't understand why that is a Commission decision. Even if they accept the appeal where does that leave them, there is no hearing to be held since no decision has been made at this point.

Mr. Fink, an Administrative Suspension without Pay which is non-disciplinary suspension, an individual has the right to appeal that to this Commission, do they not?

Mr. Corey, read Rule 14.1 MATTERS WHICH MAY BE APPEALED, A-4 is Suspension, this is a suspension. It's found in Rule 1 *"Suspension is: involuntary imposed leave without pay or reduced pay"* that is exactly what we have before you.

Mr. Rubin asked so what would the Commission be able to hear?

Mr. Corey responded, you can hear whether or not the conditions of the imposition of the involuntary suspension have been met. If they are concluded then it's not valid to continue it forever or beyond the time the inquiry was concluded. Otherwise there is no remedy that's Mr. Stories' point.

John Fink, would the question be, is it in the best interest of Pima County?

Mr. Corey stated no.

Discussion ensued regarding the interest of the County as well as the timeline of the investigation.

Mr. Fink wanted to hear why it was not filed in the 10 calendar day timeline.

Mr. Storie stated he had his reasons at the time. As it existed as disciplinary suspensions there were still investigations going on at the time. Mr. Storie stated he would not contest "in the best interest of the County" but he would like a Jurisdictional Hearing based on the conditions, you can place someone on Admin leave without pay for non-disciplinary reasons, the conditions no longer exist and the county is far past, that is not a valid Status any more to be placing an employee on based on his knowledge.

Mr. Rubin questioned MSC Rule 12.3, Section E, the County Administrator must approve the continued suspension if it exceeds the 30 day limit. Both have exceeded the 30 days and has the County Administrator approved the continued Suspensions?

Mr. Jurkowitz stated it did not matter, if there is a misapplication of the rules that process that would be a Grieve able issue and would not go through the Commission so it was not relevant. The Jurisdictional Appeal is whether it was timely filed, nothing else. Their remedy would be back pay and made whole.

Mr. Storie, is not asking for review of the merits at this time, he just wants to know when the investigation will be completed. He does not want to have to go to Superior Court to request a Special Action Hearing.

Discussion ensued regarding the investigation timeline and if any disciplinary action following the inquiry can be appealed.

Mr. Fink, he thinks the rule is clear, unless there is good cause for not filing in a timely manner, there is no good cause for going beyond the 10 day Calendar day and MSC does not have jurisdiction.

Extensive discussion ensued regarding the timeline for, timely appeals, admin suspension without pay status, and if an evidentiary hearing could be heard by the Commission to find out if the inquiry was still ongoing and what the remedies would be.

ACTION: Mr. Rubin motioned to deny the Jurisdiction Appeal, Mr. Freund second.

ACTION: Mr. Fink called to the question, motion passed unanimously to deny the Jurisdictional Appeal for both Messrs. Jaime Silva and Jesus Silva.

Session ended on this matter at 10:23 am.

Minutes approved on: June 26, 2020