

City of Coral Gables City Commission Meeting
Agenda Item F-1
September 8, 2009
City Commission Chambers
405 Biltmore Way, Coral Gables, FL

City Commission

Mayor Donald D. Slesnick, II
Vice Mayor William H. Kerdyk, Jr.
Commissioner Maria Anderson
Commissioner Rafael “Ralph” Cabrera, Jr.
Commissioner Wayne “Chip” Withers

City Staff

City Manager, Patrick Salerno
City Attorney, Elizabeth Hernandez
City Clerk, Walter J. Foeman
Deputy Clerk, Billy Urquia

Public Speaker(s)

F-1 [Start: 10:35:02 a.m.]

Discussion regarding the adopted policy of unearned annual and sick leave from employees' leave banks.
Commissioner Rafael “Ralph” Cabrera, Jr.

Mayor Slesnick: F-1 – Mr. Cabrera.

Commissioner Cabrera: Thank you. I asked staff to include in the agenda packages a letter from Interim City Manager Maria Jimenez, which she wrote last March, and that letter was addressed to twenty-one retired employees here in the City of Coral Gables. Actually no, the number is twenty-one, but seventeen were affected by this letter; and at that time she asked that a policy that had been implemented by our former City Manager that they reimburse the City for a policy that she felt was not a policy that was conducted with the appropriate authority of the City Commission, and more importantly with the Charter; and soon thereafter she rescinded the policy, and this had to do with accrued, unearned annual and sick leave from employees' leave banks. The Interim City Manager reversed the policy and in fact during that process also asked for reimbursement from those who had been paid, and to the best of my knowledge one participant paid the City back, and I think that was approximately \$8,000. So I want to commend her first of all for catching the policy, and I want to commend her for discussing it with all of us and making us aware of it, and then for taking – for having the courage to rescind it. What I think this discussion today is about is the twenty-one people that did receive payment; and as I read the letter she originally sent out to the former City Manager, at least in my eyes its very clear that the policy that he implemented went beyond his specific powers and duties; and that's based upon Section 24 of the Charter; and I ask you to look at item number 6 of the specific powers and duties of the City Manager, and number 6 says to perform such other duties as maybe required of

him by resolution or ordinances of the Commission. So it's my argument that this was not approved by us, I don't know if some of you were aware of it, I was not aware of it, I was never made aware of it, and therefore, I do not feel comfortable that those funds had been sent out and they should be recovered by the City of Coral Gables. As I look at the number, it is \$128,751 that was paid out. Incidentally, I also included under Article 4, Officers and Employees, Section 2-196, that is Compensation of Officers and Department Heads and others, and it says, the salaries or compensation so fixed shall be uniform for like service and each grade of the service as the same shall be framed or classified by the City Manager in accordance with the rules and regulations adopted by the Commission. So, I consider this a compensation issue; I see no other way to bring it to you all attention, because when this first happened, and Interim City Manager Jimenez went through the process I just described, I asked that I be kept abreast of what was happening, and I had to make that request two and three times, and so finally I saw no other recourse than to bring it before the five of us so that we could discuss it openly; and even though I don't like bringing these kinds of things up, I seriously don't, I see no other recourse but to discuss it amongst us, and I can tell you that my thinking on this is that these monies should be returned based upon the information that I read to you from our Charter, and its very specific; and I know counsel has weighed in on this, but its really ironic because counsel has weighed in on this issue now, but they weighed in on this issue then. The letter that Interim City Manager Maria Jimenez wrote back in March was with the help of counsel, so counsel must have done their homework and felt comfortable enough that what she was doing was the right recourse to take. Now as I understand it, as I continue to bring it forward, and as I continue to ask questions about this, perhaps counsel has taken a different position on this matter. So that's the reason why this is all brought up.

Mayor Slesnick: Well let's ask the City Attorney if she will give us an opinion on the legal aspects, not the...

City Attorney Hernandez: Well let me just...I feel that it is important to address the issues of counsel, because I am not sure that's its clear as to what counsel we are discussing. Neither City Manager David Brown asked for the input of my office when he promulgated the initial rules and changes to the rules, and I do not believe that the City Manager's office in preparing this letter to the prior City Manager requested the input of my office. They may have requested the input of the City's Special Labor Counsel, I can't speak for them that would be inappropriate for me to speak for them, so I won't address that aspect of it. I will tell you...

Commissioner Cabrera: Let me just say to you, when I said counsel, I was not addressing you, I was not addressing your office, so I apologize, I was specifically addressing outside Labor Counsel.

City Attorney Hernandez: OK. As you are aware, the City Commission by a vote 3-0 overturned a decision of the City Manager, however the City of Coral Gables by Charter is a strong City Manager form of government, and as such it is the opinion of my office that the City Manager had the authority to implement the accounting procedures under the implementation of the EDEN program and specifically had the authority because not only are there resolutions that authorize the City Manager to adopt and implement rules, but specifically under Section 21 and 24 of the City Charter, the City Manager is responsible for the administration of the City of Coral

Gables. This gives the powers and authority to the City Manager to run the City. In order to prevail against the individuals who relied on the actions of the prior City Manager, approximately twenty-one of them, which would include the prior City Manager, the City would need to prove one of three things; that the City Manager acted outside their constitutionally created or delegated authority under the City's Charter, Codes and resolutions; or that the City Manager abused their discretion acting under the Charter; or that the actions of the City Manager were contrary to law. It is the opinion of the Legal Department of the City of Coral Gables and as your appointed City Attorney, that the chances of prevailing in such an action are minimal at best. However, in the past this office has given opinions of that nature and this Commission has voted to move forward and it is always within the discretion of this Commission as to how they wish to act in any action.

Commissioner Cabrera: I appreciate the City Attorney's response; I don't agree with it, in all due respect, and you know what's really sad, it's kind of sad that I had to bring this forward to the five of us for discussion, because this matter should have been addressed a long time ago, I'm not blaming anyone, I'm just blaming the circumstances that lead to this, and I'm not accusing anyone of doing anything illegal or trying to help themselves as they got ready to retire; I just think that what was done was wrong, and if some of you had conversations with the former City Manager about this issue, then by all means tell me. I never heard about this, this was never presented to me by him; this was never discussed. The very first time I learned of this was through Ms. Jimenez' office, and since then every time I ask, and I can provide you all if you like, with copies of my e-mails asking for an update, I don't get one. I get told that counsel is looking at this, counsel is looking at this; well maybe counsel is not doing their job, and maybe we need to replace counsel, because if a Commissioner is making a request that I think is a legitimate request, I think that any of you...you know I can go right down the line and think of things that you have all requested during your careers where I've been a part of it, and I've always respected your request, and I've always seen that you have gotten the responses, whether it's the American Legion or Lourdes Academy, or anything else that we may be interested in having changed or adopted or corrected, so I don't get it, and so I'm not as frustrated anymore because I think time has gone by, but I still believe that a wrong needs to be corrected, and this wrong has not been corrected thus far; and so if the fear here is that if you support my efforts it's going to cost us a lot of money to litigate this – I can give you lots and lots of examples of how much money litigation cost the City over some of the actions that we've taken over the last eight years. That's how I feel.

Mayor Slesnick: Mr. Withers.

Commissioner Withers: Thanks Ralph, I commend you for taking this head on because I know it's not an easy issue. I guess my question directly to you is, to recover it, I guess our only option if they voluntarily did not want to return the money would be to legally pursue it, that's where you are headed with this, I'm assuming.

Commissioner Cabrera: I am, I am; and by the way you know that somebody did pay.

Commissioner Withers: Yes, I commend that person for paying.

Commissioner Cabrera: I do too, I do too; and you know the minimal briefings that I've received, I've been told we need to send that money back, that's what's been said to me.

Commissioner Withers: I guess my concern is, I'm assuming Liz, you researched this and you might have even asked others, or there might be case history, or something to support your minimal chance of recovery. Can you fill me in?

City Attorney Hernandez: Commissioner, as with any opinion that the City Manager makes or wishes to pursue or this City Commission and individual Commissioners, I do request the input of my Special Counsel on certain matters, and that is part of the work product of my office.

Commissioner Withers: So we have someone else besides you that has researched this?

City Attorney Hernandez: Yes.

Commissioner Withers: You know Ralph, I agree with you that I think the policy stinks, I mean, whether it was because our computer system has a glitch, in private business as you know, people accrue vacation time after six months or nine months or whatever it is, but management always reserves the right that if someone needs an advance on vacation pay, you've done it a hundred times, so have I; this seems a little different because its obviously in the public sector, but I really, if we don't have the law on our side how do we pursue it...?

Commissioner Cabrera: Well I understand.

Commissioner Withers: Do we spend \$50-\$100,000, or whatever, I don't know what it would cost to go after these folks just to get slammed down and not recover.

Commissioner Cabrera: But ironically just to get the cards on the table, ironically as I said before, the same attorney that helped draft the letter of March 20th, the letter that was sent to the former City Manager, that same attorney has now come back with their own opinion, as the City Attorney has given her own opinion, and I still don't agree with it; I read to you the Charter, I think the Charter prevails in these kinds of issues; look, if I didn't feel strongly about this I wouldn't be bringing it up on such a difficult day.

Commissioner Withers: Liz, is this an issue that we can do a Shade Meeting on pending litigation and discuss, because I have some questions.

City Attorney Hernandez: No, no, under Chapter 286, the only opportunities you have for a shade meeting with regard to litigation is when litigation is actually filed; we can meet for one of two reasons, which one is settlement discretions, and the other is settlement strategy.

Commissioner Withers: Liz, I can obviously meet with you one-on-one regarding this at any time.

City Attorney Hernandez: Yes (um huh).

Mayor Slesnick: Mr. Salerno.

City Manager Salerno: Thank you Mayor; with respect to clarifying the Manager's office role since the Interim had sent the letter out, we monitored the timeframe that the Interim Manager had sent to those individuals, when the time had past approximately sixty days, I inquired as to whether or not before taking any further action to collect those fees I'd asked for an opinion, clarification of whether or not efforts to go forward would be worthwhile, that was done several months ago; I think it was probably three months ago that I requested it and I believe the City Attorney likewise asked the same question at that time, and the answer was just received recently within the last very short period; and based upon that I didn't take any action to follow up on the letter of the Interim City Manager at the time. Had we been advised to the contrary we certainly would have.

Mayor Slesnick: Mr. Kerdyk.

Vice Mayor Kerdyk: Yes, first of all let me answer Commissioner Cabrera, I was never engaged by the former City Manager and he never mentioned this type of policy whatsoever, his change in policy. I didn't see eye-to-eye with him on a lot of issues so he probably wouldn't have come to me with his thoughts there. For me, I would feel more comfortable if we had a few weeks to talk to labor counsel, which I think is who you are referring to, so that I could hear their thoughts directly, and then come back and re-engage this conversation at the next Commission meeting to see how we proceed. The one thing that I don't want to happen is that we pursue a lawsuit that we cannot prevail on.

Commissioner Cabrera: We do that all the time.

Vice Mayor Kerdyk: I know, that's why I'm trying to get away from it...

Commissioner Cabrera: Oh – I like this, I'm going to remember, I'm not against you...next time we get ready to sue somebody, or we are going to do something, I'm going to remind everybody about this one.

Vice Mayor Kerdyk: And I'm not so sure that I don't agree with you on this, but I would like to hear the opinion of our legal counsel...

Commissioner Cabrera: I understand, I respect that, I respect all your opinions, but you know what's ironic?- and I wish counsel was here, ironically this opinion just came down I would say either last Wednesday, Thursday, or possibly Friday, prior to that we are talking about March of this year, and you know how I am, I don't forget stuff, and I keep asking for updates on this stuff, and in fact on one update, in one request for an update, our Interim City Manager was literally, I believe, asked to provide a particular response that personally offended me, not because – it wasn't because of her, because I know that's not the way she talks to me, but it was just a not yet, we are not ready to do this. So I'm assuming there was some time needed to research the matter further, but ironically that decision came "down the pike" just last week.

Vice Mayor Kerdyk: Just to let you know, my first question to legal counsel will be, why did you give one opinion at one time, and why have you changed it to this other opinion at this time, I want to hear that explanation before I make a final decision.

Commissioner Cabrera: I asked that question, I'll let them tell you.

Vice Mayor Kerdyk: Alright.

Commissioner Anderson: As far as I'm concerned the Manager never spoke to me about that either, and you're right, probably thinks he never obviously had done that would have never passed muster with me if I'd known about it, and I don't have any problem in revisiting it as the Commission wishes, where I am going to throw this out, the folks that were affected by it that didn't know the policy was inappropriate or deemed inappropriate, wonder where that money is? - some of them may have used it, it's just a hard time recovering. Yes, they were kind of, and I'll use the word innocent by-standers in this situation where they thought they had the right policy. So where I'm having a hard time chewing on this, I asked the City Attorney could we just sue the Manager, which would be, I would love that, but we can't, because it just offends me tremendously that this happened and that he took advantage of a policy that he instituted for himself, it just makes me crazy. Where I'm having trouble, and maybe I'd like to get clarification from counsel is, for these employees that really didn't have anything to do with the policy, that's where I'm having a hard time.

Commissioner Cabrera: I understand and that's sensitive of you.

Mayor Slesnick: Mr. Withers.

Commissioner Withers: Yes, just one last comment. Maybe if we are going to bring this back in a week or two when we all have the chance, I really think in all fairness to the City Manager's office, previous City Manager, Interim City Manager, and current City Manager, that we look at how this took place; I don't know from what I understand, it just wasn't a signature at midnight on a Friday, that it was vetted, it was submitted to unions, it was submitted to departments, it was circulated in the proper channels from what I understand. So I really think in all fairness opposed to looking at attorney's decisions before we cast such dispersions on...whether it was a right policy or a wrong policy, that's one issue...

Commissioner Anderson: No matter what labor counsel says on this one, it's still a wrong policy for me.

Commissioner Withers: Well the process that it went through I think is important, in all fairness.

Commissioner Anderson: Yeah...

Commissioner Withers: Because look, I don't agree with it what was done, but I don't know how it was done, so I really can't evaluate how it was done before we bring this thing to full circle. So that's just my opinion.

Commissioner Cabrera: I leave you with this thought then, because it sounds to me like we are going to have, based upon what Vice Mayor Kerdyk said, we are going to have some follow up on this and I don't know if its going to come back to the Commission or not, I took my best shot at this; but I'll leave you with this thought, this policy that was implemented and then later rescinded was a policy that affects labor, it was a collective bargaining item, this was a benefit that we provided to labor – collective bargaining units without any reason to do so, and this Commission to the best of my knowledge, is the body that makes those kinds of decisions before they can move forward. So I hear what Ms. Anderson is saying, and I appreciate her sensitivity to these people, I too share some of her concerns about how they may have spent this money, but I still believe you earn what you get and these people did not earn these monies, and it's a \$128,000, its not chump change, its \$128,000 it could be applied to the bottom line, I don't know.

Commissioner Anderson: What monies that's something that didn't earn that's not a benefit to anybody now, rightfully so because that shouldn't have never been instituted. I think to a great extent I agree with your logic as far as the Commission as an authorizing body, especially when it affects money, legislatively and our fiduciary responsibility.

Mayor Slesnick: Mr. Cabrera has raised the issue about the collective bargaining item; I would call to your attention the 4-10 Plan in the Police Department, we didn't know about that...

Commissioner Cabrera: Yes.

Commissioner Anderson: Yes, I know.

Mayor Slesnick:...and that is something in my other life in my profession I negotiate on all the time...

Commissioner Cabrera: I thought you mentioned it one time too; I remember you mentioning that one time.

Mayor Slesnick:...it just was incredible to me that, that was given without any kind of negotiations, it's a very valuable thing, which is a mistake; but let me say this, as we pursue this and talk to people, maybe you all should talk to Ms. Jimenez too, because it was Ms. Jimenez who first brought this entire issue to my attention, and she and I had very sincere heart to heart conversation about it, but I also would say Ralph, and this is not to either undermine your argument or even to...but I would think that in some defense of the attorneys, and Ms. Jimenez can talk to you all each individually about it, is that if the attorney did help Ms. Jimenez write it, I don't know that that implied that the attorney was asked or gave a legal opinion, but helped the Acting City Manager write a letter that she wish to write. So I'm not sure that there is as much direct conflict between two opinions, I just don't know that, so I don't know that, I'm just raising that. As a fellow attorney I respect Ms. Hernandez' opinion and I know we all do, and Mr. Cabrera is right, she has warned us before and we have taken off where we felt morally compelled to act on something, but that does not mean that I weigh any less her opinions, and I appreciate her opinion here, and I think it needs to be weighed carefully. Ralph, if its OK with you, we are going to take two weeks and come back to it.

Commissioner Cabrera: If it doesn't get brought back by...

Mayor Slesnick: Well we'll put it on the agenda right now.

Commissioner Cabrera: Well, if it doesn't get brought I'll make sure, and I appreciate your support on that.

Mayor Slesnick: We are putting it on the agenda Mr. Manager.

Commissioner Cabrera: And I appreciate you all input, I really do, the fact that you all took the time to at least extend me the courtesy...and I think we all are pretty much on the same wave length here, but I know some of the restrictions that we are facing. Thank you.

[End: 10:59:05 a.m.]