

MINUTES
Cuyahoga County Human Resource Commission
Wednesday, January 9, 2013
Lakeside Place Building
323 W. Lakeside Avenue, Suite 400
5:00 p.m.

1) CALL TO ORDER

Chairman Wolff called the meeting to order at 5:00 p.m. Commissioner Simmons made a motion to approve the minutes from the December 19, 2012 meeting. Commissioner Palmer seconded the motion. All were in favor; no objections.

2) ATTENDANCE

Chairman Robert Wolff, Commissioner Kathleen Palmer, Commissioner Simmons, HRC Administrator Rebecca Kopcienski, HRC Coordinator Jessica Vezina, Assistant Prosecutor Sara DeCaro, Assistant Law Director Amy Marquit Renwald, HR Director Elise Hara and Max Rieker, Esq.

3) PUBLIC COMMENT – Attorney Max Rieker introduced himself as the legal counsel representing Mr. Lawrence Desotell.

MAX RIEKER: My name is Max Rieker. I am an Attorney that represents Laurence Desotell in an appeal that is pending before this commission and I am here, one of my functions here is to see if you have any questions about the matter that is before you but also to urge this Commission to adopt the Hearing Officer's report and recommendation of reinstating Laurence Desotell and granting him back pay and like I said if you have any questions I have lived with this case for many months and know it pretty well and am here for whatever you need.

CHAIRMAN WOLFF: Okay and that is actually probably realistically the next thing we are going to get to so hold tight for just a moment....any other public comment? No...okay.

4) UNFINISHED BUSINESS– Nothing Submitted

5) NEW BUSINESS

a) Appeals

i) Desotell, L. - Report and Recommendation

Attorney Rieker spoke with the Commission regarding Mr. Desotell's appeal.

CHAIRMAN WOLFF: That brings us to new business and the first thing on the agenda is the Desotell appeal. So I have a few questions but if you have a presentation you would like to make or some points you want to reinforce for us feel free.

MAX RIEKER: Well I think, thank you, the points that I would like to reinforce are quite frankly the Hearing Officer's report. We had several hours of testimony, multiple witnesses, dozens of exhibits, it was clear to Hearing Officer Gordillo that two things, first of all that the job abolishment was accomplished I guess if you want to call it that way by the Public Works Department was an inappropriate job abolishment for a variety of reasons that are explained in his report, the second point is that is this business about whether he had, whether my client Lawrence Desotell has displacement rights or not and we relied to a certain extent on a case called Norris vs. Elyria which again was flushed out extensively in Hearing Officer Gordillo's report and recommendation and he agreed that the interpretation of that case renders the situation whereby Desotell absolutely had displacement rights to the next lower job within the job classification series. When the appointing authority filed objections to the Hearing Officer's report and recommendation, they cited a case called Nowell and as I have pointed out if you probably read my brief composition to that Nowell they take out a little piece of dicta that could mean anything and it says that a court shouldn't second guess the appointing authority but the whole meaning in that case is the exact opposite proposition it actually the Court of Appeal case in Nowell which now the appointing authority kind of hangs it's hat on actually put that employee back to work, it did exactly what their dicta in that case suggest they shouldn't do so you know. I just want to point that out and to use the Chairman's phrase reinforce the idea that Nowell doesn't stand for what the Department of Public Works says it stands for, that the holding and incuse in that case stands for actually the exact opposite so with that I mean I really don't have much more of a presentation.

CHAIRMAN WOLFF: I have a question and my fellow Commissioners may have some as well. On the initial issue of the propriety the appropriateness of the position elimination itself before we get to the bumping issue. It seemed to me that Mr. Gordillo's analysis and yours to some degree was based on the fact that two existing employees assumed your client's former duties. Am I correctly..?

MAX RIEKER: That is part of it, yes.

CHAIRMAN WOLFF: So why that, why is that a fact that helps the Mr. Desotell's case rather than the County's case, that is kind of where I was confused.

MAX RIEKER: Well what the facts demonstrate is that Lawrence Desotell was in that position of Building Maintenance Superintendent for the Justice Center Complex for I think 11 or 12 years and during that time, much of that time he had a Custodial Supervisor under him that helped him perform his duties and he had a Supervisory Senior Facility Manager above him. When Desotell's job was abolished and he was improvidently laid off, the work that he was performing was taken over by another Building Maintenance Superintendent and another ... a Custodial Supervisor that hadn't been performing those job duties before, so one person is doing all the work in question now is being replaced by two people that were then responsible for that work.

CHAIRMAN WOLFF: But didn't that result in what had been three people doing those collective duties into two people doing those collective duties?

MAX RIEKER: No it went from one person doing those duties to two people doing those duties.

CHAIRMAN WOLFF: But were the other individuals assuming Mr. Desotell's duties in addition to their preexisting duties, I mean they were not new hires?

MAX RIEKER: They were not new hires, it's my understanding that the Building Maintenance Superintendent that took over Desotell's duties was physically removed from some other County area of responsibility and physically put into Justice Center Complex for that to be his primary job focus.

COMMISSIONER SIMMONS: Was that flushed out in the hearing? Because my confusion was were these two employees who took over Desotell's job also still doing the prior work in addition to, which would render it facially more efficient, but I don't know that that was really, that that fact was brought out in the hearing.

MAX RIEKER: I can't recall the exact testimony, the hearing took place in July so I don't remember the exact scope of that testimony but I can tell you that the Department of Public Works never refuted it, they never alleged otherwise. I don't know whether the testimony affirmably established that but the County never made an argument contrary.

COMMISSIONER SIMMONS: And so Desotell's doing his job by himself and yet the person over him and the person under him.

MAX RIEKER: There was a person under him for a period and that person ended up leaving through attrition and that person wasn't replaced so for purposes of supervision within the Department of Public Works there were two primary supervisors there was Desotell and a person above him and then afterward there was a person above Desotell, T. Morales then another Building Superintendent and the addition of a Custodial Supervisor.

COMMISSIONER SIMMONS: So it went from Desotell and his superior to Desotell's superior and the other two people that took over Desotell's job?

MAX RIEKER: Correct.

COMMISSIONER SIMMONS: So the question, so are you arguing that the reason it is more efficient is because two people took over doing his job solely? In other words that is all they are doing, those two people are just splitting if you will the job duties of Desotell? In other words would your argument change if in fact two employees were doing Desotell's job plus other jobs they were already doing?

MAX RIEKER: I don't think the premise of Desotell's argument changes, you know it is still more people being called upon to do that work and one of the things that was flushed out at the Hearing and that the, and I believe, the Hearing Officer noted in his report recommendation is the fact that the Justice Center Complex is far and away the largest physical plant area of any other County facility that would have the involvement of the Building Maintenance Superintendent and there was no demonstrated increase in efficiency by the move that the County accomplished and the Director of Public Works when she was questioned about this, I know I cross examined her and I actually think the Hearing Officer questioned her as well she wasn't able to demonstrate any tangible indication that anything became more efficient. It was just one person is gone and two people now take this role and the actual work that was being performed is no indication at all in the record that had been increased in terms of efficiency or economy.

CHAIRMAN WOLFF: I think where COMMISSIONER and I are both hung up because we are both asking the same questions she asked more understandably than I did that if the if you've got this work and it was done by three and then it is done by two what more do you have to prove to show that it is for the efficiency of the service?

MAX RIEKER: But Mr. Chairman our contention is that it was done by two and is now done by three, you know that is the argument.

CHAIRMAN WOLFF: Explain that a little more.

MAX RIEKER: That just prior to the abolishment there was the Senior Manager, then there was Desotell and that was it, and as we sit here today there is the Senior Manager, the quote-unquote extra layer of supervision that the County relied upon at this facility as opposed to the other facilities there was remember their main justification for the abolishment in the first place the extra layer of supervision. Well now rather than taking away a layer of extra supervision they added an additional layer of supervision so now there are three people there is a Senior Manager, then the

Building Maintenance Superintendent and now Custodial Supervisor and the building interesting enough the Building Maintenance Superintendent who is doing that job now was formally a custodian two levels below Lawrence Desotell so that kind of cuts to the bone it is someone who took a long time advancing through the ranks and this is the person who effectively displaced my client who had been in that job for years and years prior - almost a decade - this person even being promoted to that level let alone you know taking over a facility like that, so I don't know if that answers your question?

COMMISSIONER SIMMONS: Well I think my confusion is like we have similar confusion but two arguments on that issue or two issues on that confusion. If you had, because I am just focused on what Desotell was doing, so prior to his layoff he was the only person doing it, his job, not his supervisors?

MAX RIEKER: Yes.

COMMISSIONER SIMMONS: After his termination two people were doing his job, to me that sounds less efficient unless the Appointing Authority is saying yea two people are doing his job but they are also doing other jobs as well, they absorbed the work so that we didn't have to you know well, I would assume they would pay the persons more money but if they absorbed the work, if two people absorbed the work of one person like Kat said and still handled other responsibilities that sounds more efficient than just saying we went from one to two people and I think that your argument is there weren't, that the people who replaced him, there was no evidence that they are still also doing their other jobs.

MAX RIEKER: And that is precisely what the Hearing Officer found, yes.

COMMISSIONER SIMMONS: Okay

KATHLEEN PALMER: That was kind of my question. What percentage of their duties are Desotell's old duties, these two gentlemen who took over his responsibilities?

MAX RIEKER: I don't know the answer to that question.

KATHLEEN PALMER: Yes that is the question - did they absorb the position just as the common rule of thumb when you have any kind of layoff and the area where I had some confusion with the retention points and I may need your help on this one Elise, is it seemed that he was with the County longer maybe I don't understand the retention points formula, it seems like he was there longer than most of the others who did not get laid off.

MAX RIEKER: He was certainly most senior in his job classification.

KATHLEEN PALMER: Yea but even more senior than the one in the lower class as well.

MAX RIEKER: I don't know that because of the clear four Building Maintenance Superintendents all together and it was, the job classification was contracted from four to three and I think these other three worked their way up from Custodian or some other position over a long period of time and Desotell was senior in terms of rank for lack of a better term than anyone else in the job classification. He was the most Senior Building Maintenance Superintendent at the time of his abolishment.

KATHLEEN PALMER: And that is a better way of saying it, is that he had the longest time and service in that particular job.

MAX RIEKER: He had the longest...

KATHLEEN PALMER: Maybe not in the County but...

MAX RIEKER: It is undisputed that he had the longest time in the grade. The County has never contended otherwise.

CHAIRMAN WOLFF: See my problem with Mr. Gordillo's reasoning is if you felled this on how many people absorbed the duties of the individuals whose job was abolished then that reasoning is going to get you to the conclusion that it is less efficient, if you divide my job up for two, there are twice as many people doing it, if you divide it among four people there are four times as many people doing

it but if the net number of employees is reduced in the department then I think it is a fallacious reasoning to decide it is less efficient because the duties have been divided up among a lot of folks.

MAX RIEKER: Mr. Chairman I would add that the County bears the, the Department of Public Works bears the burden of proving that it is more efficient...

CHAIRMAN WOLFF: This is true.

MAX RIEKER: And the Hearing Officer said they had their opportunity over hours of testimony to prove their case and they did not prove their case, they did not bear the burden of proving that this was a necessary job abolishment nor did they prove the legal propriety of refusing him displacement rights and so in both of those instances that the County failed. You know Lawrence doesn't have to prove anything.

CHAIRMAN WOLFF: That's true.

KATHLEEN PALMER: The two gentlemen who absorbed the position, they were not at the Justice Center prior?

MAX RIEKER: Correct, they might have been there at some previous point in their career I don't know about that.

KATHLEEN PALMER: But not in this role.

MAX RIEKER: Correct.

CHAIRMAN WOLFF: I think I would like to know what the record does reflect, if anything about the other duties, those folks were continuing to perform and it doesn't seem to be addressed in the...

KATHLEEN PALMER: I pulled from it that it would be just like adding another location to your responsibility kind of like I am responsible for this building, this building, and this building and now I am responsible for the Justice Center too or part of it anyway first shift or second shift that is kind of what I gleaned from it.

CHAIRMAN WOLFF: If we are talking about the bumping issue so Mr. Desotell didn't have any bumping rights in this classification so he refers to the next classification in the progression correct? Walk me through this.

MAX RIEKER: Well okay so in this job classification series there are two job classifications for sure. There is Building Maintenance Superintendent and Custodial Supervisor and Custodian might even be in the job classification series we didn't, the Director of Public Works didn't testify to that but on cross examination she did testify that Building Maintenance Supervisor is within the job classification series so in terms of the number of retention points Desotell would have had the least number of overall time in public service retention points that were counted within the higher job classification within the job classification series, 411 points I think others within that series had slightly higher and actually funny the person who had the greatest number of retention points was the person who had been in that grade the shortest period of time, I think he was in that grade for a year or so, he was the one that used to be 2.2 ranks below Desotell so you know our alternative theory of the case is that if the job abolishment is found to have been proper, Desotell according to the way the code reads and certainly through the interpretation of the Norris case which was discussed in our brief and at the hearing itself, low man in grade is to bump into the next lowest grade which here would have been Building Maintenance or I am sorry Custodian Supervisor and then the lowest person in terms of the number of retention points in that job classification gets bumped and so forth until the lowest person in the lowest classification gets laid off, this is the way it works in the Police and Fire Departments and the statute and statutory construction interpretation that was analyzed in Norris cites to the statute that controls here.

COMMISSIONER SIMMONS: And you are talking about 124.321(D)(3)(d) not 124.324?

MAX RIEKER: I believe so, let me confirm that.

COMMISSIONER SIMMONS: Because 321(D)(3)(d) deals with a person's position has been abolished whereas 324 deals with a person who's been laid off.

MAX RIEKER: Yea we are talking about 124. 321(D)(3).

COMMISSIONER SIMMONS: (D)(3)(d)

MAX RIEKER: Might be (D)(3)(d).

COMMISSIONER SIMMONS: Because it says if the employee's position has been abolished has fewest retention points in the classification the employee shall displace the employee with the fewest retention points in the next or successive lower classification. So this section it doesn't talk about who has fewer retention points but in 324 the one when it is a laid-off employee then the person with more retention points has the right to displace someone with fewest retention points in the next lower classification successively lower classification. I am not actually asking you a question, obviously just I want to make sure and I think in your brief you did say you were talking about 321(D)(3)(d)?

MAX RIEKER: Yes.

COMMISSIONER SIMMONS: And I will just check to make sure because it looks like the...

KATHLEEN PALMER: We have a separate question.

CHAIRMAN WOLFF: Go ahead.

KATHLEEN PALMER: One of the things that your client talked about once he was involved in other projects that the other Building Maintenance Superintendents were not involved in, building upgrades, elevator, were these duties do we know also absorbed by the other two people who took over or who absorbed his responsibilities?

MAX RIEKER: I don't know that they were. The fact of the matter is, and I think certainly some of this was handled during Desotell's direct and cross is the fact that he was for years the kind of the go-to guy, you know certainly in the Justice Center and Court House Square and the Old Courthouse

these are all a part of the Justice center complex that were under his responsibility and whenever there was anything unusual that cropped up - new ventilation system in the County Jail, swearing in ceremonies, you know all these special projects, renovation of the elevators he was the guy essentially, for lack of a better phrase, that oversaw all of this.

KATHLEEN PALMER: Do you have a feel for what percentage of his time was spent of that, in general?

MAX RIEKER: I mean I think quite a bit. I was talking with a Supervisor in the Justice Center about an hour and half ago and mentioned us coming here on the Desotell matter and he said Lawrence is really good, that was the thing that this Sheriff's Captain told me, so I get the impression through the testimony that he was the person to handle all manner of special things, special projects.

KATHLEEN PALMER: That brings us back to the efficiency question is, were those also, those duties also absorbed or...

MAX RIEKER: I have no reason to think that they were.

KATHLEEN PALMER: Did another person all of a sudden, did they add another person to the mix?

MAX RIEKER: I have no reason to believe that these special duties were absorbed by anybody nor has the County taken a position that they were, either at the hearing or in briefs. The County has been silent in that matter, I think that again goes back to the County failing to meet its burden of proof in this case.

COMMISSIONER SIMMONS: Well I think the one (*inaudible*) point in your argument about displacement rights, even though the statute section that you were relying on for what to do in an abolishment favors you, the definition of displacement is what doesn't because displaced, the word displaced, involves displacement from one who has less points than you, so it is like this statute is saying, if your job is abolished you only have to displace someone with the fewest retention points in the next or successful lower classification. And I am not saying that necessarily means that you

win. I say the reading seems to favor you more, but the words “is displaced” assumes your replacement is taking on the position you have fewer retention points, so that’s where I am.

MAX RIEKER: But I don’t think that the, I think the underlining statute doesn’t require that, the statute says the person with the fewest retention points in the job classification upon an alternate layoff if there is a classification series and he or she is higher than the lowest rung in that job classification series gets to bump the person in the next lower classification and then that person with the fewest points in that classification either gets laid off if it is the lowest rung or they continue on down the line. And the Norris case, the part about the Norris vs. Elyria that I find most persuasive is when the Court of Appeals talks about the statutory construction and the legislative intent of the statute and they clearly say the purpose of the statute, the intent of the legislature was to have a system of merit whereby the best people get retained and the more senior people get retained. So Desotell, if the County were able to accomplish its action and it warrants reverse somewhere down the line, you would have a horrible precedent of people are at the top albeit they might not have as much seniority as some of the other people but they can get, number two and number three in a department can get laid off and someone who was previously a lower-rung person who is promoted a day before a layoff situation the person gets promoted the day before a layoff situation keeps his or her job and a person who has been in that position for 20 years gets shoveled out the door, that’s not the way the legislature constructed the statute and again Norris...

CHAIRMAN WOLFF: Norris is talking about their hypothetical. It’s not hypothetical in that case it is about the Lieutenant who reverted back to Sergeant?

MAX RIEKER: Yes and it was a firefighter.

CHAIRMAN WOLFF: Lieutenant back to firefighter?

MAX RIEKER: Yes.

CHAIRMAN WOLFF: And the Court of Appeals in Norris says that you would want the experience of the Lieutenant?

MAX RIEKER: Absolutely.

CHAIRMAN WOLFF: Even if the firefighter has been with the force longer?

MAX RIEKER: Correct, I am sorry I interrupted; there was just a little piece in the Norris decision that you know, Mr. Chairman, exactly to your point. Norris said under the city's logic it would be forced to demote a ten-year veteran at a position in favor of someone who had only been appointed to the rank a day earlier just because the more recently appointed appointee had been hired by the department as a regular fireman one week earlier, such a result is not only illogical but it undermines the purpose of a civil service system and then it goes into its legislative intent analysis and says, if you do it the way the County Department of Public Works does it, you lay off the top people, you lay off the most experienced, the most able, the most educated people in favor of people who just happened to be in the work force longer so it sort of, it doesn't, there is a disconnect there.

COMMISSIONER PALMER: Isn't that kind of arguing that if you don't like the formula they follow? I mean granted yes, it was all based on merits and you can pick the best people but that is not the formula that they follow right? It is based on a certain criteria that get retention points and it's very objective, if you have this many, you get to keep your position, and if you have the lowest, you don't, I mean it seems like you are kind of arguing that you don't like the formula more than I guess the fairness of the formula.

MAX RIEKER: The formula itself having of points is fine. Where the Appointing Authority ran afoul is it didn't follow the law in terms of applying the point system. There is a point system, the point system you know would apply okay, but what the County did was ignore the intended statute, ignore the case law and you know that's why we feel that we ought to be successful on this matter. And the only case that the County cites contrary is that Nowell case and the holding in that case puts

the abolished, laid-off employee back to work. That is a State Personnel Board of Review case and the Court of Appeals reversed it and said you have to put this person back to work. And the Nowell case was also a lack of funds case not an organizational efficiency case.

CHAIRMAN WOLFF: What do you think the meaning is of the language? It says, "the laid off employee may displace the employee with the fewest retention points in the next lower classification or successively lower classification in the same classification series."

MAX RIEKER: Just to put out a hypothetical, Mr. Chairman, so you have high classification, low classification and high classification. You have persons with 100, 200, 300 retention points and the next lower classification you have persons with 700, 800, 900 retention points so you are going to have a layoff situation the person involved in the layoff, the person in the high classification series who would be laid off, is laid off would be 100 person, that person bumps to the next lowest classification within the classification series and a 600-point person then either bumps or gets laid off that is the way the statute works, that is the way the court interprets it.

CHAIRMAN WOLFF: Right, but talking about the logical nature of it, working the firefighter context, you know that you have to go through the ranks that you pointed to Mr. Desotell's position and with the progression it is an original appointment in the County for a very short time, your job is abolished you can displace the person and then in the series of steps below you is perhaps been with the County for 20 years.

MAX RIEKER: Although it is an unlikely scenario, the Court of Appeals would say yes that is how it works.

COMMISSIONER PALMER: It is kind of contrary to your firefighter, because in this case Mr. Desotell would have the least amount of experience as a Custodial Supervisor, you would be displacing somebody who has probably more years of experience as a Custodial Supervisor so I guess it was kind of your argument for the Lieutenant versus the firefighter, you're displacing where you want

to keep somebody he could be this person with ten year's experience could be the best go-to guy for the Custodial Superintendent.

MAX RIEKER: Who should have been promoted in the first place?

COMMISSIONER PALMER: Well, but maybe they didn't want to be, more promotion, more headache, so maybe he is smarter than all of us. But in this case would he be displacing somebody who could be the go-to guy in the Custodial Superintendent job who has, and Desotell would have the least amount of experience in that job as you talk about the cascade, just like you are arguing he should, you know, his position should not have been abolished because he is the go-to guy in this case if you believe he could what I would call bumping down to the next classification he will be displacing someone who has more experience than he does in that particular job.

MAX RIEKER: Yes, I would also just note that I mean that the hypothetical you raise, yes that is what the law would say, but here the fact is you have arguably, and certainly we argued it and wasn't really refuted at all, the most talented person within the job classification, in the whole classification series and he is the one who gets walked out the door. So you know just as your hypothetical poses an injustice, the fact of the matter here before you is that a huge injustice was perpetrated upon Desotell and that is why we are asking this commission to adopt the Report and Recommendations.

COMMISSIONER SIMMONS: But I would also note that talent isn't a part of the equation when you are talking about displacement rights.

MAX RIEKER: No, it is not.

COMMISSIONER SIMMONS: So you are assuming, in other words, given the retention points there should be a maybe, perhaps some factors for talent, I am not sure how that works but when you are deciding how those points affect displacement rights you are not supposed to take into consideration who you think is more talented.

MAX RIEKER: No, I believe that talent and education and ability, these and an actual ability to perform the work, these are all things that cut to the propriety of intentional abolishment and have nothing whatever to do with displacement.

COMMISSIONER SIMMONS: I thought you were arguing because what was partially unfair about Desotell not being able to displace the other person was that you have someone with more talent not being retained and I am saying that's not a factor.

MAX RIEKER: It's not a factor. I was just responding to Commissioner Palmer's hypothetical that, you know, that it does work both ways but in terms of displacement rights, bumping rights, talent had nothing to do with it.

CHAIRMAN WOLFF: Any other questions? First I want to tell you that you have done a spectacular job representing your client here.

MAX RIEKER: Thanks.

CHAIRMAN WOLFF: I think this is one where we ought to have an opinion maybe - tell me what is kosher and what isn't but maybe discuss it maybe... can we circulate drafts of an opinion if we want before we issue anything? I am not sure I am ready right now to rule on this one. Do you guys want to be heard?

HR DIRECTOR HARA: No, we, the only position is that we are all briefed and the only argument I would make with respect to counsel's reliance on a case falls outside of the Eighth District Court of Appeals so it is not binding authority on the decision and obviously we dispute his interpretation. When this County took over with respect to the new administration having to make decisions, it was done with the most objective mechanism in place, which is retention points, to assure a fair analysis of how these people would have their positions and I think that has been well reiterated at the hearings as well as the briefs. With respect to the necessity for the position I have to defer to

the Director of Public Works because I certainly am not going to substitute my judgment of how to run her department.

CHAIRMAN WOLFF: I have spent more time in the Justice Center than I would like to and I take administrative notice of the challenges of keeping that place fresh and tidy. So we are probably going to talk with our legal counsel probably before our next meeting. Thank you.

MAX RIEKER: Thank you, I appreciate your time.

CHAIRMAN WOLFF: This is the first time that we have done this for the record because you have raised some issues and this one warrants it.

MAX RIEKER: There is one thing that I want to offer. In the County's objections to the Hearing Officer's decision, you know, they argue that basically nobody, neither this Commission or the Court or anybody is permitted to substitute his judgment for the judgment of whatever department head or Appointing Authority, I would just say that I think that is a bunch of bologna, you know. You have the State Personnel Board of Review, you have the Human Resources Commission, you have, you know, layer upon layer of administrative and appellate review this doesn't exist but for to, you know, review the judgment of these entities so anyway with that, I will shut up.

CHAIRMAN WOLFF: Does... I would like to know exactly what it says about the other two people. I know they didn't testify but if they are still doing all their prior duties plus.

COMMISSIONER PALMER: And these extra duties, these projects, that is what I assumed from...

CHAIRMAN WOLFF: I assumed that as well.

COMMISSIONER PALMER: I changed my mind several times.

CHAIRMAN WOLFF: I changed my mind several times too.

COMMISSIONER SIMMONS: I was clear when I read your memo and then I listened to him and I was like, okay.

ASSISTANT PROSECUTING ATTORNEY DECARO: The only thing that in comparison in using the case they were talking about, like you were saying the fire department is a whole different statute and I think they wanted the Lieutenant to come down because they did a service for however long before they became a Lieutenant. Now, should I drop down to a paralegal? Probably not.

COMMISSIONER PALMER: He doesn't think it is fair that his go-to guy lost his job but he is going to displace the go-to guy in the next classification down who is not going and he is not going to think that is fair either. The question of whether they had a right to do it or was it more efficient, I am kind of past that now, I am still trying to wrap my head around the displacement.

COMMISSIONER SIMMONS: This is no, I mean is this really an issue of first impression? I can't believe.

ASSISTANT PROSECUTING ATTORNEY DECARO: I mean basically what they say is okay so it is a different statute for the firefighters and the police and they say the youngest is almost the same language but they use youngest and I need to find out about seniority and if what they say what makes sense. Because somebody who is a Lieutenant who had been a Sergeant for ten years before then became a Lieutenant and it made sense in that, and they said, and by the way there is this other statute that says the same thing, it wasn't the issue before because the firefighter was there, so really, it was them saying, oh yeah just to bolster our opinion here's another statute that says the same thing.

CHAIRMAN WOLFF: And he is right, that is the way I know that those rights are effectuated in the safety forces.

COMMISSIONER SIMMONS: Has no one ever tried to displace someone with more retention points but in a more lower classification?

ASSISTANT PROSECUTING ATTORNEY DECARO: I think when Rebecca and I were talking about it, it made sense that there probably isn't a County that has gone through the transition that our

County has where we had so, just a complete overhaul where we had all this in all these positions that may be unnecessary and I just don't think any County has ever gone through this.

CHAIRMAN WOLFF: It must happen at the State level all the time.

ASSISTANT PROSECUTING ATTORNEY DECARO: There are no cases.

COMMISSIONER PALMER: I thought we had cases where people have been displaced?

CHAIRMAN WOLFF: We have been interpreting it with the way the County interpreted it.

COMMISSIONER SIMMONS: We haven't had this narrow issue of A has fewer retention points than B, and B is in a lower classification.

CHAIRMAN WOLFF: So one of the things we need to do is to, in any event, make it clear that our interpretation is consistent with Sara's opinion that if we decide to agree with that but I think we might want to think about a way to make that, I don't know.

ASSISTANT PROSECUTING ATTORNEY DECARO: You can rewrite that, I don't mean you but Council, County Council should probably look into this particular statute and probably write it a way that they, it doesn't help for the past, but moving forward.

CHAIRMAN WOLFF: And do it in a way that says that we are just confirming and clarifying.

ASSISTANT PROSECUTING ATTORNEY DECARO: I think Kat had a good point that is exactly what he is arguing with the formula, it is exactly what it is.

COMMISSIONER PALMER: He doesn't like the formula, and I get that, if it was my client I would argue that too.

ASSISTANT PROSECUTING ATTORNEY DECARO: Right and maybe the Justice Center does need the guy who knows how to fix the elevator, I have been stuck on those things a million different times that is not very organized.

COMMISSIONER SIMMONS: So was I right or I am a little confused about how to read 124.321(D)(3)(d) verses 124-324 because I was made a distinction or noted a distinction if someone's job was abolished or just laid off?

ASSISTANT PROSECUTING ATTORNEY DECARO: So your job is abolished or laid off, you are getting bumped but I think the distinction is in the 321(D)(3)(d) it says when it reduction in force this statute applies.

COMMISSIONER SIMMONS: Okay.

ASSISTANT PROSECUTING ATTORNEY DECARO: And I believe that is what the County was doing a reduction in force.

COMMISSIONER SIMMONS: So you never give it to, okay if I am just wondering why this 124-324 comes into play, I guess I just don't understand if your job is abolished why is there a need to be a next step of analyzing okay now what do we do if they are laid off because isn't abolishment the layoff?

ASSISTANT PROSECUTING ATTORNEY DECARO: Well, both actions can be taken but you can go back to the reduction in force, I mean just have one layoff as opposed to a reduction in force, but I will say that the law was just changed as of, I want to say November 18, where 324 only applies to State employees.

COMMISSIONER SIMMONS: So this doesn't apply to State employees, this was before?

ASSISTANT PROSECUTING ATTORNEY DECARO: No, but it has been changed and I am not sure I understand the distinction or why that particular section only applies to the State and I did search the SPBR opinions.

CHAIRMAN WOLFF: Did you look for OAG opinions?

ASSISTANT PROSECUTING ATTORNEY DECARO: Yes.

CHAIRMAN WOLFF: It is interesting if you look at it as a matter of policy you can see it both ways.

ASSISTANT PROSECUTING ATTORNEY DECARO: And displacement is designed as somebody with fewer retention points.

COMMISSIONER SIMMONS: And ultimately what we are trying to do is set it up so ultimately if it goes to court, then that is really going to answer the question but we want to have a clear...

CHAIRMAN WOLFF: Right we want to have a clear understanding.

ASSISTANT LAW DIRECTOR MARQUIT RENWALD: So are you asking me to do something, I am not clear.

CHAIRMAN WOLFF: I am not clear, I think well, what I was suggesting was going back and amending our rules which I think we need to do through Council, to clarify this issue but we issue an opinion that says we think it's clear but a court reverses us. We clearly have the rights through our rulemaking do that so we would have to amend the rules first and then go have to start with us anyways right?

ASSISTANT PROSECUTING ATTORNEY DECARO: Right but your rules wouldn't apply to Desotell.

COMMISSIONER PALMER: I think the County recognizes that this is an issue because that is I think one of the reasons why they are moving towards this merit based, it's harder, it is more subjective but at least in that case you would factor in some of these things like he does these special projects and sort of helps out with other things in the facility blah blah blah...

CHAIRMAN WOLFF: That is why so many places go to merit for this stuff because it gets so muddy...

COMMISSIONER PALMER: It can.

CHAIRMAN WOLFF: My concern is not creating some sort of a positive action for all the people who have come before us who were not treated in the manner that Gordillo thinks that is due them. I don't know what cause of action they would have but determinations are final and appealable.

COMMISSIONER SIMMONS: And I am not so clear on, I am not so sure I agree that they didn't bear the burden of proof that it was efficiency, an efficiency-based layoff so we may not even have to get to this opinion of what we all think about this.

CHAIRMAN WOLFF: See my thought is, if you take three people at the end of the day two people and put into the job of three people it is efficiency.

COMMISSIONER PALMER: But they don't want three people on the floor, only one person.

ASSISTANT PROSECUTING ATTORNEY DECARO: I think that is the question, I need to listen to the audio to find out did they continue to do their other jobs plus his job.

COMMISSIONER SIMMONS: Three people before the layoff and before the displacement.

CHAIRMAN WOLFF: Right, so if this is the work that was being done by Desotell and the other two fellows and you divide this into three and then after the layoff the same chunk of work is being divided by two then I think, by definition, it is for the efficiency.

COMMISSIONER SIMMONS: His argument is that only one person is doing Desotell's job. He is not arguing that there were three people.

CHAIRMAN WOLFF: Right that is why I think it is a fallacious argument because then anytime someone's duties are split up among other people you are going to say well, Rob was doing it by himself now five people are doing it but now you are dividing the duties by five people.

COMMISSIONER PALMER: Yeah that is the nature of it - there were four of them before and now there are three of them, doing the same work except for, I am unclear about these extra duties, these extra projects but yes you hit it on the head we had a four head count and now a three head

count and the same work is getting done now maybe not all of it is getting done but the stuff that is not getting done they are okay with, it is just like we would do in any other layoff, it's like okay lets divide it among three of us rather than the four of us.

COMMISSIONER SIMMONS: I am just confused; I don't - before the layoff Desotell was the only person doing his job.

CHAIRMAN WOLFF: Right.

COMMISSIONER SIMMONS: They got rid of him then essentially hired two people.

CHAIRMAN WOLFF: Now if they hired them that would make it easy, they didn't these were two people that were doing their own duties in addition are now doing his.

COMMISSIONER SIMMONS: And I would agree if that is what happened that is more efficient but if in fact they sent these people and somehow put them in place to do Desotell's job and just Desotell's job.

CHAIRMAN WOLFF: And then clearly ...

COMMISSIONER SIMMONS: And that is his argument is that it was Desotell by himself and these two people came in to do his job.

CHAIRMAN WOLFF: That is what we have to look at.

COMMISSIONER SIMMONS: And I think that's the County's argument - no these two people absorbed his job with their own, so that is what we have to be clear on.

CHAIRMAN WOLFF: We know the head count is down in that department and we know these people were working prior to Desotell's layoff and continue to work.

COMMISSIONER SIMMONS: Then do we then have to get into, well, what happened to the jobs that they were doing before they were moved into doing Desotell's job?

ASSISTANT LAW DIRECTOR MARQUIT RENWALD: That is what I am thinking if someone probably absorbed, they left some of their jobs behind and someone probably absorbed it, if you look at the total number of people, if it is reduced then it doesn't matter who is doing what you still have a reduction.

COMMISSIONER PALMER: If there is definitely that cascade reduction effect down.

COMMISSIONER SIMMONS: So do we need to get into that?

COMMISSIONER PALMER: At the end of the day though you are still, you had four, you have three now.

COMMISSIONER SIMMONS: But did they have four?

COMMISSIONER PALMER: Yeah they had four; they eliminated one for the Building Maintenance Superintendent's position. Now unfortunately for them it was the guy at the Justice Center who had the largest facility, more duties, first and second shift, probably the toughest gig out of the four, unfortunately had the fewest points so he had to go. I think given the choice if they had to pick they probably would have picked somebody at the smallest facility, the least amount of responsibilities rather than this guy, but that is not the formula and I think that is part of what he is arguing he doesn't like the formula and I understand his point but in this case.

CHAIRMAN WOLFF: Interesting issues, so how should we proceed on this, I would like you if you could, take a look at the record and maybe draft something for us to look at can you do that?

ASSISTANT PROSECUTING ATTORNEY DECARO: Yeah, it is within your deliberative process but what I am going to do is listen to the testimony and I'll do a memo on what the testimony says and I'll let you guys look at that and decide which direction that you want to go.

COMMISSIONER PALMER: And the more I read these statutes and definitions the more confused I get.

CHAIRMAN WOLFF: Well yeah you can read the files, the rest of the world agreeing with us, assuming Council agrees with us.

COMMISSIONER PALMER: That is what kind of stopped me when I lead down that road, was, in the past there was a cascade, there was a, if I had the least then I can go down and bump the person with the least at the next level so I was kind of looking at well what was our past practice that kind of thing.

CHAIRMAN WOLFF: The past practice was as the County did it this time. Okay so that is Mr. Desotell.

COMMISSIONER PALMER: You don't think the past practice with the County, our argument or his argument, they didn't let him bump or didn't let him displace?

CHAIRMAN WOLFF: They, you are going from two by two now to two by one. The practice by the County has been if (inaudible).

COMMISSIONER PALMER: He didn't have the points to displace anybody in the next level down.

CHAIRMAN WOLFF: Right he didn't have the displacement points.

Chairman Wolff asked that Assistant Prosecutor DeCaro listen to the audio from the HRC hearing and submit an opinion to the Commission. Chairman Wolff made a motion to defer this Report & Recommendation to the next HRC meeting on January 23 2013; Commissioner Simmons seconded the motion. All were in favor; no objections.

ii) Jurkiewicz, C. - Report and Recommendation

Commissioner Palmer made a motion to affirm the Report & Recommendation submitted by Hearing Officer Gordillo; Commissioner Simmons seconded the motion. All were in favor; no objections.

iii) Schaefer, K. - Report and Recommendation

Commissioner Palmer made a motion to affirm the Report & Recommendation submitted by Hearing Officer Tsevdos; Commissioner Simmons seconded the motion. All were in favor; no objections.

iv) Price, V. - Report and Recommendation

Commissioner Palmer made a motion to affirm the Report & Recommendation submitted by Hearing Officer Szuter; Commissioner Simmons seconded the motion. All were in favor; no objections.

v) Corrigan, C. - Report and Recommendation

Commissioner Palmer made a motion to affirm the Report & Recommendation submitted by Hearing Officer Gordillo; Commissioner Simmons seconded the motion. All were in favor; no objections.

vi) Gallagher, J. - Report and Recommendation

Commissioner Palmer made a motion to affirm the Report & Recommendation submitted by Hearing Officer Zeiser; Commissioner Simmons seconded the motion. All were in favor; no objections.

vii) Thomas, R. - Report and Recommendation

Commissioner Palmer made a motion to affirm the Report & Recommendation submitted by Hearing Officer Szuter; Commissioner Simmons seconded the motion. All were in favor; no objections.

viii) Garrity, N. - Report and Recommendation

Commissioner Palmer made a motion to affirm the Report & Recommendation submitted by Hearing Officer Zeiser; Commissioner Simmons seconded the motion. All were in favor; no objections.

b) Update to Classification Plan

Administrator Kopcienski shared with the Commissioners the draft Ordinance and updates to the classification plan, as submitted by HR Director Hara. Due to re-organization and job abolishments in years 2011-2012, twenty-one classifications are proposed for deletion. The HRC will post these positions on their website. The Commission can then act on these updates at the

January 23, 2013 HRC meeting. The Commission asked that a representative from Human Resources department be present at the January 23rd meeting to answer questions they may have pertaining to this discussion.

c) Administrator's Report

Administrator Kopcienski distributed status reports to the Commissioners and discussed the year-end report that is being prepared. Chairman Wolff requested that Administrator Kopcienski contact the HR department for statistics to be included in the report.

6) PUBLIC COMMENT – Nothing Submitted

7) OTHER BUSINESS – Administrator Kopcienski and the Commissioners discussed topics to be addressed in the upcoming meeting with the Charter Review Commission. Discussion ensued.

8) ADJOURNMENT

Chairman Wolff made a motion to adjourn the meeting at 6:50 p.m. Commissioner Palmer seconded the motion. All were in favor; no objections.

Next Human Resource Commission meeting is scheduled for Wednesday, January 23, 2013 at 5:00 p.m. at Lakeside Place (323 W. Lakeside Avenue, Suite 400), *but the meeting may be held at a different time as the Commission may be meeting with the Charter Review Commission on the same date.*