

MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA

Telephonic Meeting

Held at 800 West Washington Street

Phoenix, Arizona 85007

Thursday, December 2, 2021 – 1:00 p.m.

Present: Dale L. Schultz	Chairman (Telephonic)
Joseph M. Hennelly, Jr.	Vice Chair (Telephonic)
D. Alan Everett	Commissioner (Telephonic)
James Ashley	Director (Telephonic)
Gaetano Testini	Chief Legal Counsel (Telephonic)
Trevor Laky	Legislative Affairs Chief/Public Information Officer (Telephonic)
Renee Pastor	Self Insurance (Telephonic)
Jessie Atencio	ADOSH Director (Telephonic)
Brandt Smith	ADOSH Compliance (Telephonic)
Casey Ruyle	ADOSH Compliance (Telephonic)
Karen Schomburg	ADOSH Compliance (Telephonic)
Emily Flynn	ADOSH Compliance (Telephonic)
Steve Black	ADOSH Compliance (Telephonic)
Anna Maria Stonerock	ADOSH Admin (Telephonic)
Kara Dimas	Commission Secretary (Telephonic)

Chairman Schultz convened the meeting at 1:00 p.m. Also in attendance on the telephone, confirmed by roll call were Joe Zingaro and Susan Strickler (Arizona Counties Workers' Compensation Pool); Samantha Wright and Jerry Spears (Maricopa County); Derrick E. Ethington (Complainant); Melanie Weigand (Barrett & Matura PC representing Arizona City Fire District); Chief Jeff Heaton (Arizona City Fire District); Matthew Mullins (GuardTop); Greg Narsh (Troutman Pepper representing GuardTop); and Savannah Scharnhorst (Snell & Wilmer).

Approval of Minutes of November 18, 2021 Regular Meeting Minutes.

Commissioner Everett moved to approve the Minutes of the November 18, 2021 regular session meeting and Vice Chair Hennelly seconded the motion. Chairman Schultz, Vice Chair Hennelly and Commissioner Everett voted in favor of the motion. The motion passed.

Consent Agenda:

All items following under this agenda item are consent matters and will be considered by a single motion with no discussion unless a Commissioner asks to remove an item on the consent agenda to be discussed and voted on separately. The Commission may move into Executive Session under A.R.S. § 38-431.03(A)(2) to discuss records exempt by law from public inspection. Legal action involving a final vote or decision shall not be taken in Executive Session. If such action is required, then it will be taken in General Session.

a. Approval of Proposed Civil Penalties Against Uninsured Employers.

1. 2CMO21/22-0006 Robert J. Wimberly dba B Line Movers \$1,000

2. 2CSP21/22-0021 Wild Western Horseback Adventures LLC \$1,000
3. 2CNP21-22-0282 Goget My Laundry LLC \$5,000

b. Approval of Requests for Renewal of Self-Insurance Authority.

1. Arizona Counties Workers' Compensation Pool
2. Maricopa County
3. Procter & Gamble Company

Chairman Schultz commended the consistent wonderful experience modification factor for Maricopa Count at .91.

Commissioner Everett moved to approve the items on the Consent Agenda as presented and Vice Chair Hennelly seconded the motion. Chairman Schultz, Vice Chair Hennelly and Commissioner Everett voted in favor of the motion. The motion passed.

Discussion and/or Action of Arizona Division of Occupational Safety and Health Discrimination Complaint.

2017-4067-29 Ethington vs. Arizona City Fire District

Mr. Atencio noted that the Compliance Officer, Mr. Ruyle, and Supervisor, Mr. Smith were available for questions. The Commissioners were provided copies of the ADOSH Findings of Merit and the Report of Investigation (ROI) for their consideration prior to the Commission Meeting. Mr. Atencio summarized the report noting the Complainant established a causal link between the protected activity and the adverse action. The preponderance of evidence did support a causal link between the protected activity and adverse action, which is the nexus. The protected activity took place on or around April 18, 2017 and May 1, 2017 when the Complainant filed an online safety complaint. The temporal proximity shows the Complainant was terminated May 6, 2017. There is an animus within the case, on or about April 19, 2017, Chief Heaton drafted damaging statements against the Complainant, evidence uncovered via witness testimony, documents and recordings indicated that both had a conversation on or around April 18, 2017 in which Chief Heaton referenced the Complainant as a friend and made references to the Fire District's succession plans and the Complainant. Mr. Atencio noted there is evidence that the manner in which the employee was treated when employed and also terminated was different from others who were insubordinate. An Investigator from the Arizona Division of Occupational Safety and Health uncovered Jeff Heaton making false and damaging statements concerning the Complainant therefore Chief Heaton's credibility comes into question.

Mr. Atencio noted based on the ROI and analysis completed, ADOSH recommends the Industrial Commission of Arizona to pursue the case.

Vice Chair Hennelly noticed the activity at issue occurred in 2017 and asked why the Commission was looking at this four and a half years later. Mr. Atencio noted the reason for the delay is there were a couple of compliance officers who were handling the case as well as the supervisor, that the case was transferred from person to person and took a long time to complete the investigation.

Vice Chair Hennelly asked if the passage of time affected any of the findings or brought to light any additional information. Mr. Smith noted there was no additional information at this point.

Chairman Schultz followed up on Vice Chair Hennelly's comments about the timing, and asked if it is still a timely complaint or if any statute limitations apply. Mr. Testini noted that with respect to the complaint, the controlling statute is A.R.S. §23-425 and pertinent timelines are that allegations have to be made within 30 days and the department has to notify the employer within 90 days of receipt. Other than that there are no other statute of limitations.

Chairman Schultz confirmed with Mr. Atencio that it was reported within the 30 day timeframe and notified within 90 days. Chairman Schultz noted he had the same issues as Vice Chair Hennelly had about the timeliness of this issue.

Chairman Schultz checked if Mr. Ethington would like to comment. Mr. Ethington did not have any comments at this point.

Chairman Schultz checked if Ms. Weigand would like to comment. Ms. Weigand wanted to address the timeliness of this issue, as you can see from the documents, this Complaint was brought back in 2017, and here we are four and a half years later with no movement on this issue, and raised an issue that any sort of retaliation claim in the State of Arizona brought against the public entity must be brought within one year that the cause of action occurred. That is the District's position on the timeliness of this investigation and this complaint. She turned it over to Chief Heaton for specific comments.

Chief Heaton stated that prior to his arrival at the Arizona City Fire District in 2015, the Fire District's performance lacked gravely. It was a weekly occurrence for the Fire District to miss EMS and service calls. All of the Fire District positions prior to 2016 were part-time positions being filled with full-time fire EMS personnel from other fire agencies in the area. It was a weekly occurrence to have open and or unfilled staff positions with the Arizona City Fire District because of this type of schedule. Many times part-time members abandoned their scheduled positions with the Arizona City Fire District because they were called back to work and/or attend mandatory meetings at their full-time fire and EMS position agencies. In 2016, they implemented a full-time fire work schedule in the Arizona City Fire District to address the operational issues that were occurring and the lack of service they could provide their customers. Mr. Ethington, because of his existing full-time position as a Battalion Chief with the Eloy Fire District for many years was not able to work what was needed at the Arizona City Fire District on their full-time schedule to address the operational issues and more importantly safety issues. Mr. Ethington's lack of availability to work the new full-time operational schedule, being an at-will employee, and his insubordination issues was why he was no longer needed by the Arizona City Fire District.

Chairman Schultz asked if there was anyone else that wanted to address this issue.

Vice Chair Hennelly noted he had a couple more questions. Going through the material provided, it appeared that the various memos that were prepared with respect setting forth purported misconduct and insubordination and absenteeism with respect to the Complainant and seems that those were not prepared contemporaneously with the reported conduct, they were prepared later.

Mr. Smith confirmed that Vice Chair Hennelly was reading that correctly.

Vice Chair Hennelly also confirmed with Mr. Smith that it does not appear those materials or memos at least, were ever presented to the Complainant in the matter at the time of the incidents.

Commissioner Everett had a question that he may have overlooked in the voluminous material, he did not see anything in the write-up about Arizona City Fire District moving from part-time employees to full-time staff, which the Chief just brought up as one of the reasons for the termination. Mr. Smith did not recall that being part of the termination.

Chairman Schultz and Mr. Testini discussed if the Commission does decide to pursue the case then the issue that Ms. Weigand raised will be addressed as this matter goes forward, the Superior Court will be the one to address whether or not the appropriate timeframe was maintained. Chairman Schultz confirmed that the Commission’s decision is based upon if there is sufficient cause here to pursue the case.

Vice Chair Hennelly noted he was troubled by the passage of time, but made a motion to pursue the case pursuant to staff’s recommendation. Commissioner Everett seconded the motion. Chairman Schultz wanted to add two points, he wanted to compliment staff, even considering the lateness, on the thoroughness of the investigation. Also, as Vice Chair Hennelly, he is troubled about the passage of time, understanding that there have been many changes in all of our lives that the pandemic caused unforeseen disruption. Chairman Schultz, Vice Chair Hennelly and Commissioner Everett voted in favor of the motion. The motion passed.

Chairman Schultz thanked everyone for joining on this issue.

Executive Session under A.R.S. § 38-431.03(A)(3) and (A)(4) to Discuss Arizona Division of Occupational Safety and Health Discrimination Complaint.

2017-4067-29 Ethington vs. Arizona City Fire Department

This item was provisional and on the agenda in the event there was a need for executive session to obtain advice from counsel. There was no need for an executive session.

Discussion and Action of Arizona Division of Occupational Safety and Health Proposed Citations and Penalties.

Chairman Schultz discussed the purpose of and process for the Commission’s consideration of ADOSH citations and proposed penalties.

GuardTop, LLC.
1048 W. Maricopa Fwy
Phoenix, AZ 85007

Site Location: 1048 W. Maricopa Fwy
Phoenix, AZ 85007
Inspection No: F9669 -1542149
Inspection Date: 07/9/2021

Referral
Years in Business: 18
Empl. Covered by Inspection: 10

SERIOUS – Citation 1 - Item 1 –

- a) 1048 W Maricopa Fwy, Phoenix, AZ 85007: An employee was on top of storage tank TK-22 visually checking product levels while at a height of approximately 12' from ground level with an unprotected edge and not protected from falling. 29 CFR 1910. 28(b)(1)(i)
Div. Proposal - \$1,500.00 Formula Amt. - \$1,500.00

- a) Corn tortilla line: The Casa Herrera brand corn grinder, model and serial number unknown, did not have a guard for the feed auger from the hopper to the grinder. 29 CFR 1910.212(a)(1)
Div. Proposal - \$3,000.00 Formula Amt. - \$3,000.00

SERIOUS – Citation 1 - Item 2 –

- a) Bakery: The cooler used for employee lunches had the cover removed from the compressor, exposing the blades of the compressor fan. 29 CFR 1910.202(a)(5)
Div. Proposal - \$1,500.00 Formula Amt. - \$1,500.00
TOTAL PENALTY - \$4,500.00 TOTAL FORMULA AMT. - \$4,500.00

Mr. Atencio noted that the Compliance Officer, Mr. Black was available for questions. Mr. Atencio also corrected a typographical error on the proposed penalty to \$4,500. Mr. Atencio discussed ADOSH’s planned inspection, summarized the citation and proposed penalties, and reviewed the photographs, also noting seven non-serious violations with no penalty value.

Chairman Schultz was surprised at the seven being non-serious violations and thanked Mr. Atencio for his explanation as to why each one received a non-serious citation as opposed to a serious citation.

Chairman Schultz checked if anyone on the phone would like to comment.

Vice Chair Hennelly moved to approve the citation and proposed penalties as presented and Commissioner Everett seconded the motion. Chairman Schultz, Vice Chair Hennelly and Commissioner Everett voted in favor of the motion. The motion passed.

Announcements, Scheduling of Future Meetings and Retirement Resolutions.

Mr. Ashley updated the Commissioners with the AMS scorecard metrics for the fiscal year-to-date. He reviewed the two metrics for Human Resources: Agency Employee Training and Exit/Stay Interviews. Human Resources was also awarded the Golden Hard Hat for the month of November.

Chairman Schultz noted it is terrific to provide forums for valuable information and he also likes the idea of Stay Interviews.

Mr. Ashley also wants to remind stakeholders that we are always available for feedback and value the frequent, open dialogue and communication. And, to address a quorum of Commissioners, at least three times a month the public has the opportunity to join any commission meeting for the public comment period. In addition to those opportunities, we still add additional formal opportunities and next week we will have another stakeholder meeting at the beginning of the Commission meeting and have had a couple of requests already from members of the public that wanted to share some thoughts and ideas and he reminded the Commissioners of that for the December 9th meeting.

Ms. Dimas confirmed Commission meeting dates through January 2021.

Ms. Dimas presented a retirement resolution for Francisco Mendoza for 20 years of service as a State Occupational Safety Consultant Senior in the Tucson ADOSH Division and a retirement

resolution for Mary Beth Martin for 21 years of service as a Workers' Comp Insurance Claims Specialist 2 in the Claims Division.

Mr. Ashley noted that on December 8th the Safety Committee will hold their monthly meeting and at the beginning will be the presentation of the ICA Phoenix VPP flag and plaque and invited the Commissioners to attend.

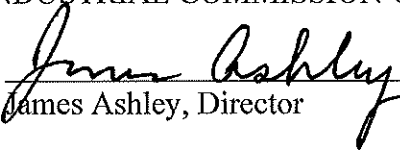
Public Comment.

There was no other public comment.

Commissioner Everett moved to adjourn and Vice Chair Hennelly seconded the motion. Chairman Schultz, Vice Chair Hennelly and Commissioner Everett voted in favor of the motion and the meeting was adjourned at 2:22 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By


James Ashley, Director

ATTEST:


Kara Dimas, Commission Secretary