

**Minutes
Tempe Police Public Safety Personnel
Retirement Board
December 10, 2009**

Minutes of the Tempe Police Public Safety Personnel Retirement Board, held on Thursday, December 10, 2009, 3:00 p.m., Tempe City Hall – Mayor’s Office, 31 E. 5th Street, Tempe, Arizona.

Board Members Present:

Mayor Hugh Hallman	Todd Bailey
Joe Brosius	Jim Foley
Jeff McHenry	

City Staff Present:

Jan Hort, Clerk’s Office
Lourdes Robertson, Human Resources

Guests Present:

David Niederdeppe, Board Attorney

Mayor Hallman called the meeting to order at 3:16 p.m.

ITEM II – Consideration of Meeting Minutes – November 5, 2009 - & Executive Session Minutes – November 5, 2009

Board members asked that the meeting date on the November 5, Executive Session minutes be corrected (they were originally submitted with a date of November 19). Jeff McHenry asked that the November 5, 2009 meeting minutes pertaining to the letter denying Mr. Tranter’s claim be clarified to state that ‘discussion ensued that the content of the July 10, 2009 letter of denial and the reason stated in that letter for denying Mr. Tranter’s application failed to note fully the boards then articulated basis for denial’. Jeff McHenry made a motion to approve the November 5, 2009 Executive Session meeting minutes as amended and the November 5, 2009 regular minutes as amended; Jim Foley seconded the motion. Motion passed unanimously.

ITEM III – Executive Session

Todd Bailey made a motion to adjourn this meeting and to convene an Executive Session; Joe Brosius seconded the motion. Motion passed unanimously.

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Meeting temporarily adjourned at 3:25 p.m. for Executive Session.

Meeting reconvened at 3:45 p.m.
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James Foley made a motion that this meeting reconvene. Todd Bailey seconded the motion; motion passed unanimously.

ITEM IV – Application for Survivor Benefits – Katherine Welker:

Mayor Hallman stated that the board has received an application that suggests that the applicant is seeking to have the cause of death determined to have been an on duty injury and it is unclear what the numbers should be, but the reason for this meeting is to determine whether or not the board agrees that this is an on duty injury or if this should be handled as a

regular/normal survival retirement. Mayor Hallman added that this is not a disability hearing, so there is a different set of standards that the board must acknowledge.

Mr. Niederdeppe read the legislative procedures and responsibilities of the board for survivor application public hearings.

Joe Brosius stated that even though there is no doctor that states where the injury occurred, the injury actually occurred while Mr. Welker was lifting an engine while Mr. Welker was assigned to the Auto Theft Task Force. Mr. Welker did not seek treatment immediately because he was a weight lifter, etc. The injury did not get better, so Mr. Welker applied for a disability retirement, which was approved. Mr. Welker had three surgeries on his back and was on pain medication. The medical examiner's cause of death is documented as being drug toxicity. Mayor Hallman commented that since the disability retirement was approved, then the board at that time must have deemed that the injury did occur during the course of duty and was work related. There was an additional 8% permanent disability noted on Mr. Welker's record. Joe Brosius stated that if it weren't for the work incurred injury, Mr. Welker would not have had to have the back surgeries and been on pain medication. Mr. Brosius indicated he knew of Mr. Welker's ongoing pain. According to the information provided it is clear that Mr. Welker took too much of his medication – more than he was prescribed. But for the injury, Mr. Welker wouldn't have been taking any medication.

Mayor Hallman stated that the question is, is this a suicide, meaning he intentionally overdosed, or was this just from a mismanagement of it, which is a tort and not a suicide. Mr. Brosius stated that only Mr. Welker could tell us this information; although, Mr. Brosius stated, he knew Mr. Welker and that there is no way it would be suicide. Jeff McHenry stated that the police report enumerates that the manner of death is undetermined – what I was getting to was his state of mind. From the interview of his widow, Mr. Welker hasn't, never has, nor has any reason, to contemplate suicide. It is correct that the OME, due to manner of death – as undetermined. After researching that term, when the OME enumerates undetermined in a death, the reason is to keep them out of court because it cannot be determined what is in a persons mind and these cases often do end up in different tortes with insurance companies, life insurance companies and it is just much easier to use that finding than try to battle court on what is in a persons mind. There is nowhere in the OME report (it has the quantities of drugs that were found in Mr. Welker's system) but nowhere does it say whether those quantities were above or beyond fatal limits. The report does say that Mr. Welker has a history of overmedicating due to the severe pain and the lack of successful pain management.

Joe Brosius stated that the police report does state that the pills issue date, number of pills, number of pills gone, which would indicate a gross mismanagement of pills. It was noted that in an interview his widow enumerates several pills taken that day, which would be beyond the prescription.

Mayor Hallman stated that the issue is the causation. Mayor Hallman clarified that Mr. Brosius is saying that the result is causation of the injury - but for the injury. From your conclusion, it sounds like that is the case and I see nothing in the record that disputes that conclusion. Everything that he could see in the package and from your own comments suggests that he was not seeking to commit suicide, he was seeking to control pain. The fact that he ended up dead does not mean that he sought to commit suicide. Mr. McHenry commented that it appeared that Mr. Welker had everything to live for including a wife, two girls, a dog and his religious convictions which would be against this. Mr. McHenry stated that to those that knew Russ, that's totally opposite – it's not even possible.

Mr. Foley stated that even if you rule out suicide as a possibility and having established the 'but for' connection, is there something in between here that you would have to come to a conclusion that it's reasonably foreseeable that someone with this kind of a work related back injury is going to die from over medication. Isn't that part of the tort analysis that has to be completed?

Mr. Niederdeppe responded yes.

Mr. Foley asked that given a whole group of people who had similar injuries, is it foreseeable that most of these people will attempt to overmedicate and die as a result of it, or is this an isolated case which would be outside of tort law? Mr. Foley asked the board if this is something that should be considered further. Mr. Niederdeppe stated that it is the charge of the board to consider this. Mr. Foley responded that whether his overmedication was foreseeable is not quite so clear.

Mr. Bailey stated that knowing Russell, and knowing his family and everything else, Mr. Welker did not show any signs of suicide at all. There was no question in his mind that the on duty part is totally documented and understandable. As a side note, he talked to someone and read the medical examiners list and by the time the list had been ¾ read to this person, she had already determined that a death took place. Perhaps the board could seek some medical advice about – does somebody have to build up a resistance to it and that's how they got to this level. That might play into it, but my feeling is, looking at the Mesa police report and so forth, on May 12, Mr. Welker was issued 20 tablets and that goes away by May 15 and he gets 15 more tablets – and there's only 3 left less than 48 hours later. It is difficult to imagine that a doctor is prescribing taking 12 of 500 milligrams of Oxycodone pills within a 24 or 27 hour period. While I understand the 'but for' he would never be in this situation but for the injury. However, I don't think the death would have occurred 'but for' taking so many pills. It is difficult to imagine going to a doctor and saying, 'hey I'm still hurt, I'm going to take 12 pills' that the doctor would say, 'yes, go ahead'.

Mayor Hallman asked if it is reasonably foreseeable that someone who is not having success managing his pain might inadvertently overdose because they are not getting the resolution. He asked, are there medical malpractice suits where doctors are held liable in instances where doctors are not properly recognizing patients that are not having success in managing their pain, and inadvertently overmedicates their patients? In this particular instance, in a case where somebody has this kind of an injury – is there risk of overmedication – is that reasonable and foreseeable based on the injury? There is a massive amount of over prescribing of pain killers going on that is shocking to the conscience and is it reasonably and foreseeable that a person could overdose. It does have to do with people developing a tolerance levels to drugs, and they need more and more to reach a high.

Mr. McHenry pointed out that Mr. Welker was in pain from the day he was injured and that is why he had three surgeries. If the medical records are subpoenaed, we would find that he had nerve damage on the third surgery and that's why they introduced the drug neurotin. This is somebody that when you went to his cubicle, he was on his knees. This is mismanagement by the medical... – it's long term and not something that just happened one night.

Mayor Hallman stated that once you conclude that there's no suicide, now the issue is - did he inadvertently over medicate and is that reasonably foreseeable that somebody would?

Mr. Bailey stated that the statute indicates that killed in the line of duty means the decedents death was the 'direct and proximal result of the performance of the duties', and does not include suicide. So the suicide part is out. Mayor Hallman stated that the direct part means 'but for', the proximate is - is it close enough to say that you could reasonably have foreseen that - what's the probability.

Jeff McHenry made a motion to accept this as a 'line of duty death' with the proviso that the death benefit calculation worksheet be reviewed and calculated appropriately for final disposition of the board. Joe Brosius seconded the motion. Mr. Bailey opposed. Motion passed 4 to 1.

Meeting was adjourned at 4:00 p.m.

Prepared by: Kay Savard

