

Law Enforcement Officers' Bill of Rights

Number: INFORMAL

Date: March 22, 2004

Mr. Robert Cintron, Jr.
General Counsel, Citizen Review Board
City of Key West
Post Office Box 1946
Key West, Florida 33040

RE: LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS--LAW ENFORCEMENT OFFICERS--MUNICIPALITIES--PUBLIC RECORDS--provisions in Part VI, Ch. 112, Fla. Stat., exclusive manner to investigate complaints against law enforcement or correctional officers. ss. 112.532 and 112.533, Fla. Stat.

Dear Mr. Cintron:

This is in response to your request for an opinion as to whether the City of Key West may create a citizen review board (CRB) with the authority to receive, investigate and make recommendations regarding complaints of police officer misconduct independent of the internal affairs procedures established by the City of Key West Police Department pursuant to section 112.533(1), Florida Statutes. You also ask whether such a board would be subject to the confidentiality provisions and public records exemptions set forth in section 112.533(2)(a), Florida Statutes, when the CRB receives complaints directly from the complaining party. If the CRB may not function so, you ask whether it may receive complaints for the sole purpose of forwarding them to the police department. Finally, you question whether the provisions of a collective bargaining agreement between the City of Key West and the Florida Police Benevolent Association controlling over inconsistent or conflicting provisions of the city's charter.

You state that the charter for the City of Key West was amended by referendum in November 2002 to create a Citizens Review Board composed of seven volunteer members appointed by the Key West City Commission. The charter authorizes the CRB to receive written complaints regarding police officer misconduct and to conduct investigations independently from the police department or the state attorney. You question the city's authority under the Municipal Home Rule Powers Act, Chapter 166, Florida Statutes, to create such a board.

Initially, I would note that this office must presume the validity of properly enacted ordinances and charters. Moreover, your question necessarily involves commenting upon the actions of the city and, absent a request from the City of Key West, this office may not offer an opinion as to whether such action is proper. Generally, however, the following comments are provided.

Part VI of Chapter 112, Florida Statutes, commonly referred to as "The Police Officers' Bill of Rights" or "The Law Enforcement Officers' Bill of Rights,"[1] is designed to ensure certain rights for law enforcement and correctional officers.[2] When a law enforcement officer or correctional officer is subject to interrogation by members of the employing agency for any reason that could

lead to disciplinary action, demotion, or dismissal, the interrogation must be conducted under the conditions prescribed by the statute.[3]

While section 112.532(2), Florida Statutes, sets forth the requirements for the composition of a complaint review board, the statute does not address when or how such boards should function.[4] Section 112.533(1), Florida Statutes, however, states:

"Every law enforcement agency and correctional agency shall establish and put into operation a system for the receipt, investigation, and determination of complaints received by such agency from any person, *which shall be the procedure for investigating a complaint against a law enforcement and correctional officer and for determining whether to proceed with disciplinary action or to file disciplinary charges, notwithstanding any other law or ordinance to the contrary. This subsection does not preclude the Criminal Justice Standards and Training Commission from exercising its authority under chapter 943.*" (e.s.)

The emphasized language above was added to section 112.533(1), Florida Statutes, in 2003.[5] The plain language of the statute makes the procedures set forth therein the exclusive means to investigate complaints against law enforcement officers and correctional officers and for determining whether to proceed with disciplinary action or to file disciplinary charges, regardless of other laws or ordinances to the contrary.[6] Where the Legislature has prescribed the manner in which something is to be done, it operates, in effect, as a prohibition against its being done in any other manner.[7] Moreover, this office has previously concluded in Attorney General Opinion 97-62 that no legislative action by a municipality may contravene, repeal or modify a preexistent civil service law, charter act, or general or special law affecting the rights of municipal employees, including municipal police officers.[8]

Section 112.533, Florida Statutes, also provides:

"A complaint filed against a law enforcement officer or correctional officer with a law enforcement agency or correctional agency and all information obtained pursuant to the investigation by the agency of such complaint shall be confidential and exempt from the provisions of s. 119.07(1) until the investigation ceases to be active, or until the agency head or the agency head's designee provides written notice to the officer who is the subject of the complaint, either personally or by mail, that the agency has either:

1. Concluded the investigation with a finding not to proceed with disciplinary action or to file charges; or
2. Concluded the investigation with a finding to proceed with disciplinary action or to file charges."

Notwithstanding the foregoing provisions, the officer who is the subject of the complaint, along with legal counsel or any other representative of his or her choice, may review the complaint and all statements regardless of form made by the complainant and witnesses immediately prior to the beginning of the investigative interview. If a witness to a complaint is incarcerated in a correctional facility and may be under the supervision of, or have contact with, the officer under investigation, only the names and written statements of the complainant and nonincarcerated witnesses may be reviewed by the officer under investigation immediately prior to the beginning of the investigative interview.[9]

The statute also states that notwithstanding the confidentiality provisions of the statute, the complaint and information is available to law enforcement agencies, correctional agencies and state attorneys for purposes of conducting lawful criminal investigations.[10] Other than the law enforcement officer or correctional officer who is the subject of the complaint, no other outside entity is recognized as privileged to the complaint or information until the employing law enforcement agency makes a final determination whether to issue a notice of disciplinary action.[11] In Attorney General Opinion 97-62, discussed above, this office concluded that the confidentiality requirements of Part VI, Chapter 112, Florida Statutes, prevent the participation of a citizens' board in the resolution of a complaint against a law enforcement officer until the officer's employing agency has made its initial findings.

There does not appear to be any provision for a citizens complaint review board to utilize the investigation procedures contained in Part VI, Chapter 112, Florida Statutes, and avail itself of the confidentiality provisions contained therein.

In light of the discussion and conclusions in Questions One and Two, it would appear that there is no statutory authorization for a citizens review board to operate as the receiving entity for complaints against law enforcement officers under Part VI, Chapter 112, Florida Statutes.

Section 447.309(1), Florida Statutes, recognizes that agents for a certified employee organization and the chief executive officer of a public employer may bargain collectively to determine wages, hours, and terms and conditions of employment of the public employees within the bargaining unit. Any collective bargaining agreement reached by the negotiators must be reduced to writing and signed by the chief executive officer and the bargaining agent. The signed agreement, however, is not binding on the public employer until it has been ratified by the public employer and by the public employees who are members of the bargaining unit. Subsection (3) of section 447.309, Florida Statutes, places a further restriction on collective bargaining agreements, stating:

"If any provision of a collective bargaining agreement is in conflict with any law, ordinance, rule, or regulation over which the chief executive officer has no amendatory power, the chief executive officer shall submit to the appropriate governmental body having amendatory power a proposed amendment to such law, ordinance, rule, or regulation. Unless and until such amendment is enacted or adopted and becomes effective, the conflicting provision of the collective bargaining agreement shall not become effective."

In *Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority*, [12] the Supreme Court of Florida considered whether a civil service board's refusal to amend its rules in order to comply with a collective bargaining agreement would unconstitutionally abridge employees' rights to collectively bargain. The court concluded that section 447.309(3), Florida Statutes, would violate Article I, section 6 of the Florida Constitution guaranteeing the right to collective bargaining for public employees, if it were interpreted to allow a civil service board to veto conflicting collective bargaining agreement provisions that have been negotiated by the public employer and the certified employee organization. The Court, however, noted specifically that its holding did not apply "to conflicts arising between collective bargaining agreements and statutes or ordinances." [13] This office has not found, nor have you provided, a subsequent court case in which this conclusion has been altered.

I trust that these comments will be of assistance in resolving these issues.

Sincerely,

Lagran Saunders
Assistant Attorney General

ALS/tgk

[1] See, e.g., *Mesa v. Rodriguez*, 357 So. 2d 711 (Fla. 1978) and *Ragucci v. City of Plantation*, 407 So. 2d 932 (Fla. 4th DCA 1981).

[2] See s. 112.532, Fla. Stat., stating that "[a]ll law enforcement officers and correctional officers employed by or appointed to a law enforcement agency or a correctional agency shall have the following rights and privileges[.]"

[3] Section 112.532(1), Fla. Stat.

[4] As recognized by this office in Attorney General Opinion 97-62, the courts and the Office of the Attorney General have expressed frustration over the absence of any legislative direction regarding the type of system required by s. 112.533, Fla. Stat., and the Legislature's failure to specify procedures to carry out the statutory responsibility delegated by the statute. See, e.g., *Ujcic v. City of Apopka*, 581 So. 2d 218 (Fla. 5th DCA 1991); Op. Att'y Gen. Fla. 76-38 (1976); Inf. Op. of February 28, 1997, to Chief Dennis R. White.

[5] See s. 2, Ch. 2003-149, Laws of Fla.

[6] See also title to Chapter 2003-149, Laws of Fla., stating that the act "provid[es] that an established system for the receipt, investigation, and determination of complaints shall be the exclusive procedure used by law enforcement and correctional agencies[.]"

[7] See *Alsop v. Pierce*, 19 So. 2d 799, 805 (Fla. 1944) (where Legislature prescribes the mode, that mode must be observed).

[8] See Ops. Att'y Gen. Fla. 86-91 (1986) and 76-38 (1976); *Ragucci v. City of Plantation*, *supra*.

[9] Section 112.533(2)(a), Fla. Stat.

[10] Section 112.533(2)(c), Fla. Stat.

[11] See s. 112.532(4)(b), Fla. Stat.

[12] 522 So. 2d 358 (Fla. 1988).

[13] 522 So. 2d at 362.