



THE VOICE OF LAW ENFORCEMENT

DADE COUNTY POLICE BENEVOLENT ASSOCIATION, INC.

April 23, 2010

Via E-Mail: crb@keywestcity.com, facsimile #1-305-293-9827& U.S. mail

City of Key West
Citizen Review Board
PO Box 1946
Key West, FL 3041

Re: Complainant Shahdaroba Rodd
CRB # 09-008\Officer Brian Leahy
CRB Findings – Response

Dear Board Members:

This letter is in response to your March 23rd, 2010 letter to Chief Lee reference sustained findings against Officer Leahy (“Leahy”) of the Key West Police Department. My name is Cristina Escobar and I am the PBA attorney representing Leahy. I respectfully request this letter be made a part of the record and the case file regarding this matter.

Pursuant to the March 22nd, 2010 CRB minutes, the CRB made a finding that Leahy was untruthful regarding an incident involving the complainant, Shahdaroba Rodd (“Rodd”). As a basis for said finding the CRB indicated that there were inconsistencies between the Crash Report and the Offense Incident Report (“OIR”) that made them question the truthfulness of the nature of the stop. Also, that it was *“disturbed by the attempts of Leahy to deny that an accident had occurred followed by the arrival of a disproportionate number of Police at the incident.”*

Addressing the allegation reference the report inconsistencies, it should be noted that just because an inconsistency may exist, this in and of itself, without further inquiry, does not automatically mean Leahy is lying. Pursuant to law, inconsistencies are not direct evidence of misrepresentation and/or untruthfulness unless clear and convincing evidence exists of malicious intent by the party accused to have made such misrepresentation. There was no malice involved here, but a simple misunderstanding/mistake between officers at the scene. In order to clarify, I proffer the following as a more accurate account of what transpired on the date of the incident:

Leahy, while riding as a one (1) man unit made a complete stop at the intersection. Leahy then proceeded to cross the intersection when Rodd (riding a bicycle without the legally required lights) skidded into the front of Leahy’s patrol car. Pursuant to Leahy’s view and the fact that he was inside the patrol car, a collision involving actual contact with Rodd was possible but questionable. Not only did

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Leahy not hear and/or feel any impact (at least not strong enough to be noticeable), but upon inspection of his vehicle there was no damage and no one had been injured. Regardless, upon noticing Rodd there, Leahy inquired from Rodd if he was okay. Rodd indicated that he was and, as evidenced from the I-COP video, Rodd walked his bike over to the side of the road. Leahy, who per policy and the law is required to stop and not leave the scene of a possible accident, stopped approaching Rodd. At this point, Rodd, who did not have the required white light on the front of his bike and is visibly intoxicated, became loud and irate towards Leahy making blanket accusations of being harassed & having been struck by Leahy's car. At some point while dealing with Rodd, a taxi-cab driver drove up and stated to Leahy that he (taxi driver) had observed Rodd riding his bike all over the road. During Leahy's contact with Rodd, not only was it evident that Rodd was intoxicated, but that Rodd was riding his bicycle without a white light as required by law. Pursuant to Florida Statute §316.2065(8), *"Every bicycle in use between sunset and sunrise shall be equipped with a lamp on the front exhibiting a white light visible from a distance of at least 500 feet to the front and a lamp and reflector in the rear each exhibiting a red light visible from a distance of 600 feet to the rear. A bicycle or its rider may be equipped with lights or reflectors **IN ADDITION** to those required by this section."*

Upon Officer Luis Sanchez's ("Sanchez") arrival at the scene, Leahy told Sanchez what the taxi driver had told him (that the taxi driver had seen Rodd riding his bike all over the road). Sanchez, who wrote the OIR, wrote the information into his report as if Leahy was the one who made said observation. This was in error, a simple mistake. It should be noted that Leahy did not have the opportunity to review Sanchez's report for accuracies prior to being submitted for approval, or any time thereafter. Therefore, Leahy was completely unaware of said inaccuracy therefore unable to correct it. It should be noted that listening to the I-COP audio one can hear Leahy attempting to locate the taxi-cab that had made the independent observation about Rodd having been biking while intoxicated. This corroborates Leahy's version of the events and gives credence to the fact that Rodd was in fact intoxicated and he (Rodd) could have ended up hurting himself and/or others.

Errors such as these unfortunately occur, after all, police officers are human too. Mistakes will happen. Simply because a mistake resulting in an inconsistency occurred, does not automatically (in a bubble) mean someone is automatically lying. You must first look to see if there is a reasonable, credible explanation that explains it away, and also whether it was a material one. That was never done here by the CRB. The CRB seems to have solely relied on the contents of the reports and Rodd's baseless accusations. There is a very good reason why police reports, just as the ones you reviewed here, are considered "hearsay." Hearsay is by law deemed unreliable unless there's more. Unless you can fit said hearsay evidence (such as the contents of these reports) into one of the enumerated exceptions, they remain unreliable and non-probative. In this case the contents of these reports per se are hearsay, unreliable and probative of nothing; at least not probative, in and of themselves, to justify the CRB calling anyone, especially a police officer doing its rightful duty, a liar. Additionally, as to the CRB relying on Rodd's version of the incident, this is an individual whose demeanor that night (as witnesses by not just Sanchez and Leahy) should make his credibility questionable and therefore unreliable. What the CRB has done here amounts to a cursory review of the matter, not a complete and full investigation which is what it should have been, if anything. This cursory review and the leap to the conclusions the CRB has reached resulted in what I submit are defamatory type findings against Leahy and the other Officers.

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As to the CRB's comment that it was "disturbed by the attempts of Leahy to deny that an accident had occurred followed by the arrival of a disproportionate number of Police at the incident." Leahy never denied anything. This is evidenced by simply listening very closely to the I-Cop audio. Leahy maintained his version of the incident throughout the encounter. Regardless of that, because Rodd made a claim there had been an accident, a Crash Report was properly generated. In reading the Crash Report I fail to see where a denial by Leahy is ever mentioned. It simply reflects the incident as seen by both parties. Leahy's version may differ from Rodd's, but it was not a denial. It is reasonable to believe that Leahy having been inside his vehicle may not have realized or known that there was any actual contact. Leahy, just like anyone else who gets into an accident, stated his side of the events. For the CRB to accuse Leahy of lying, under these circumstances and simply for stating his position which may have differed from Rodd's is not just unfair but clearly biased.

As to the reference of there being "a disproportionate number of Police at the scene," the CRB makes a mention of this as if there was anything wrong with the number of officers at the scene that night. Whether there was one car or twenty (20), the number of officers and/or man power required for a police involved dispatch is not within the purview of the CRB to determine and/or approve. The number of officers, and/or units required on a police involved scene is solely within the discretion and judgment of the officers there, and/or their supervisors. Reasonably so, the officers/supervisors are the ONLY ones who could know (in the moment) what man power they would require to deal with a subject, the public around them and/or any other incidental matter that may unforeseeably arise during a situation. Unless any of the CRB members were there (with prior law enforcement experience), able to assess the necessity of the number of officers at that particular time and conditions, the CRB has no reasonable basis to assert that there should not have been the number of units that were there that night. There is no formula to determine this by the Police Departments, let alone by the CRB which is composed of civilians who have no law enforcement experience and no expert knowledge about law enforcement matters and/or the applicable law. Without a practical and realistic view of what really goes on "out there" the CRB should refrain from making such judgments and/or imposing opinions that negatively impact the law enforcement community and potentially create a chilling effect on the officers' duty to respond to said matters. I am not saying that the CRB ignore complaints and/or concerns such as these. However, the proper avenue, should there be a concern/complaint regarding a Key West Police Officer is to forward the complaint to the Key West Police Department's Internal Affairs Unit. They are the appropriate agency to conduct a full review and follow up investigation because they have the legal resources to do it. Therefore, only they can perform the more complete, accurate and just investigation consistent with the officers' due process rights as well as the rights of the individuals who complain against them.

The CRB is not the appropriate agency to conduct these investigations. Pursuant to the Florida Attorney General's opinion (August 3, 2006), here enclosed for your review, the employing law enforcement agency is the **exclusive agency** responsible for the receipt, investigation and determination of complaints received by the Department pursuant to the Law Enforcement Officers' Bill of Rights, F.S. 112.533. It should be noted that though the question posed in the Attorney General's letter refers to the Miami Dade Police Department, clearly the reasoning applies to all police departments within the State of Florida subject to the Law Enforcement Officers Bill of Rights. As a result of the CRB continuing

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to undertake these partial and incomplete reviews of these matters, without more than just the base reports and/or other incidental items, such as was done here, officers such as Leahy, are being falsely accused by the CRB of serious violations which negatively impact a police officer's career. The CRB making these types of allegations/findings in the manner in which they have gone about doing it has the potential of legally exposing the CRB and the City to defamation claims. I am also very troubled about the newspaper article(s) that were printed reference this matter, not based on confirmed facts, but merely on the cursory review conducted by the CRB in this matter.

Furthermore, the CRB made reference to the report(s) being authored by a different officer and that errors were made in the report as to the descriptions of clothing and/or location as if any of this was material and/or Leahy's wrongdoing. It is clear from the reports that Leahy did not author any of them. If the CRB would be familiar with Departmental policy they would know that different officers, writing reports is not an uncommon practice and actually sometimes required. Since Leahy was alleged to have been involved in the accident/crash himself, he would not be allowed to write his own report. Another officer must investigate and report the matter, such as it was done here. As to the OIR, Sanchez was the investigating and arresting officer for the DUI, therefore, Sanchez properly wrote said report which was inclusive of the infraction and Leahy was a witness.

Regarding the alleged errors in description, clothing, etc, under the law, there is such a thing as inadvertent omissions and/or errors. Unless these supposed errors are deemed "material" they are totally irrelevant, prove nothing and are clearly not evidence of deceptions, misrepresentation and/or falsification. If said errors do exist, these are matters the Department and/or the Sergeant reviewing the paperwork can take up with the particular officer in order to avoid the officer from making such mistakes in the future. In this case these errors are not material. This is not an identity case, there are no identity issues and/or issues about the location of the arrest, therefore, these errors are immaterial and clearly do not substantiate a finding that there was malicious intent in the part of the officer(s) when writing down said information. In this case, these immaterial errors as to description and/or location should have never been used by the CRB as part of the reasoning leading to an allegation that any of the officers may have been lying, misrepresenting something and/or trying to deceive anyone.

As to Rodd being arrested for DUI (Bicycle) under the wrong statute, again, I fail to understand how this is in any way shape or form an alleged wrongdoing of Leahy. Leahy did not author the reports, Leahy did not conduct and/or attempt to conduct the roadsides, Leahy did not conduct and/or attempt to conduct the breathalyzer (whether legally allowed or not, that is irrelevant regarding Leahy). Leahy, after possibly colliding with a Rodd, stopped, conducted an investigation as he is procedurally supposed to do and realized Rodd had committed several violations of the law. It should be noted that an error by the officer in citing the correct statute to a charge (i.e. BUI) is not automatically dispositive of a criminal charge. Officers and/or prosecutors can, and often do, amend the charge at a later time in order for the prosecution of the case to proceed. Regardless of that, also note that in the arrest form, one of the charges is refusal to sign a citation. This charge, in and of itself is an arrestable offense. So, either way Rodd's arrest was legally justified and proper.

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The CRB makes reference to the charges against Rodd having been dropped and/or Rodd having been found not guilty to support the notion that therefore Rodd must have been illegally arrested. This is absolutely not so and troubling that such a leap was made by this Board. If any of the CRB members would have been present during the hearing when the charges were dropped and/or Rodd was found not guilty, the CRB would have known that the Judge's reason for dropping the charge(s) was that since Rodd had Christmas lights all over his bike that sufficed and therefore Rodd did not need to have the white light. Let's be clear, THE STATUTE WAS CLEARLY VIOLATED. Please refer above to the language of the statute, it CLEARLY requires (makes it mandatory) that ALL bicycles, during the hours relevant here, have a white light in the front and a red light in the back. Most importantly, it states that should there be ANY OTHER lighting or reflectors, they can be IN ADDITION to the ones already required by this section (i.e. the Christmas lights can be in addition to the white and red light required WHICH Rodd did not have). What the judge did was in essence what amounted to a pardon. Meaning, though Rodd violated the statutes, the Judge simply did not want to find him guilty. Juries do it sometimes, so do some judges. The mere fact that the charges were dropped and/or the Defendant was found not guilty, under these circumstances, is not evidence that Leahy and/or any of the officers illegally arrested and/or cited Rodd.

In conclusion, Rodd's arrest was clearly lawful as supported by ample probable cause. Rodd was driving while intoxicated that night without proper lighting refusing to sign the citation and was properly arrested for such. It is my understanding that Rodd is someone who has had prior encounters with Key West Police Officers as well. To have made the findings the CRB made against these officers, under these circumstances sends a message that Rodd's behavior and actions are condoned by the CRB and the City of Key West. This is just wrong and an injustice to the officers who were simply doing their jobs. Being called a liar is a serious matter and it should never be done lightly. I would submit that if it was members of the CRB that were being investigated for allegations such as these, they would want, and rightfully expect for the investigating body to turn every corner and look under every stone so that every effort is made so that nothing of true evidentiary value is missed (whether inculcating or mitigating). Well, these officers expect the same, as they should. I hope my letter has cleared some issues and shed some light into the facts. I therefore ask that you reconsider your decision, immediately retract the allegations of any wrongdoing and do the matter justice. Officer Leahy and the Key West Police Department Officers involved deserve better.

Sincerely



Cristina Escobar
Dade County PBA
Staff Counsel

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Encl.

Cc: Bryan Green, CRB Chairman
Hayward Magby
Virginia Altobello, CRB Member
Trice Denny, CRB Member
Michael Driscoll, CRB Member
Mark Kielsgard, CRB Member
Susan Srch, CRB Vice Chair
Brian Leahy, KWPD/Officer
Donald Lee, Chief/KWPD
Randy Smith, I.A./KWPD
Steven Muffler, Esq.
Jim Scholl, Key West City Manager



STATE OF FLORIDA

CHARLIE CRIST
ATTORNEY GENERAL

August 3, 2006

06-35

Mr. Glenn Theobald
Chief Counsel
Metro-Dade Police Department
9205 N.W. 25th Street
Miami, Florida 33172

Dear Mr. Theobald:

You ask the following question:

As the employing law enforcement agency of a Miami-Dade Police officer, is the Miami-Dade Police Department, as stated in section 112.533, Florida Statutes, the exclusive agency responsible for the receipt, investigation and determination of complaints against the officer?

Part VI, Chapter 112, Florida Statutes, commonly known as "The Police Officers' Bill of Rights" or "The Law Enforcement Officers' Bill of Rights," was enacted to ensure certain rights for law enforcement and correctional officers subject to disciplinary action by their employing agencies.¹ When a law enforcement officer or correctional officer is subject to interrogation by members of his or her 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.²

Section 112.533(1), Florida Statutes, states:

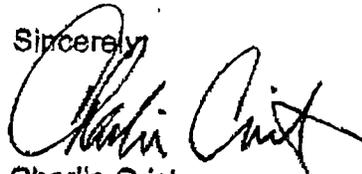
Every law enforcement agency and correctional agency shall establish and put into operation a system for the receipt, investigation, and determination of complaints received by such agency from any person, which *shall be the procedure for investigating a complaint against a law enforcement and correctional 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.)

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The plain language of the statute makes the procedures established thereunder the exclusive means by an employing agency to investigate complaints against law enforcement officers and correctional officers and for determining whether to proceed with disciplinary action, regardless of other laws or ordinances to the contrary.³ When the Legislature prescribes a means of accomplishing something, it operates, in effect, as a prohibition against its being done in any other manner.⁴ Moreover, this office has previously determined that no legislative action by a municipality may contravene, repeal or modify a preexisting civil service law, charter act, or general or special law affecting the rights of municipal employees, including police officers.⁵ It would appear, therefore, that no other procedure or system may be implemented by the employing agency to investigate complaints against law enforcement and correctional officers.⁶

Accordingly, it is my opinion that as the employing law enforcement agency of a Miami-Dade Police officer, the Miami-Dade Police Department is the exclusive agency responsible for the receipt, investigation and determination of complaints received by Miami-Dade pursuant to section 112.533, Florida Statutes.

Sincerely,



Charlie Crist
Attorney General

CC/tals

¹ 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[.]"

² Section 112.532(1), Fla. Stat., sets forth the conditions under which a law enforcement officer or correctional officer may be interrogated, as follows:

- (a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the law enforcement officer or correctional officer is on duty, unless the seriousness of the investigation is of such a degree that immediate action is required.
- (b) The interrogation shall take place either at the office of the command of the investigating officer or at the office of the local precinct, police unit,

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or correctional unit in which the incident allegedly occurred, as designated by the investigating officer or agency.

(c) The law enforcement officer or correctional officer under investigation shall be informed of the rank, name, and command of the officer in charge of the investigation, the interrogating officer, and all persons present during the interrogation. All questions directed to the officer under interrogation shall be asked by or through one interrogator during any one investigative interrogation, unless specifically waived by the officer under investigation.

(d) The law enforcement officer or correctional officer under investigation shall be informed of the nature of the investigation prior to any interrogation, and he or she shall be informed of the name of all complainants.

(e) Interrogating sessions shall be for reasonable periods and shall be timed to allow for such personal necessities and rest periods as are reasonably necessary.

(f) The law enforcement officer or correctional officer under interrogation shall not be subjected to offensive language or be threatened with transfer, dismissal, or disciplinary action. No promise or reward shall be made as an inducement to answer any question.

(g) The formal interrogation of a law enforcement officer or correctional officer, including all recess periods, shall be recorded on audio tape, or otherwise preserved in such a manner as to allow a transcript to be prepared, and there shall be no unrecorded questions or statements. Upon the request of the interrogated officer, a copy of any such recording of the interrogation session must be made available to the interrogated officer no later than 72 hours, excluding holidays and weekends, following said interrogation.

(h) If the law enforcement officer or correctional officer under interrogation is under arrest, or is likely to be placed under arrest as a result of the interrogation, he or she shall be completely informed of all his or her rights prior to the commencement of the interrogation.

(i) At the request of any law enforcement officer or correctional officer under investigation, he or she shall have the right to be represented by counsel or any other representative of his or her choice, who shall be present at all times during such interrogation whenever the interrogation relates to the officer's continued fitness for law enforcement or correctional service.

(j) Notwithstanding the rights and privileges provided by this part, this part does not limit the right of an agency to discipline or to pursue charges against an officer.

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³ See also Chapter 2003-149, Laws of Fla., stating in its title that the act amends s. 112.533, Fla. Sta., "providing that an established system for the receipt, investigation, and determination of complaints shall be the exclusive procedure used by law enforcement and correctional agencies[.]"

⁴ See *Alsop v. Pierre*, 19 So. 2d 799, 805 (Fla. 1944) (where Legislature prescribes the mode, that mode must be observed).

⁵ See Op. Att'y Gen. Fla. 97-62 (1997). And see Ops. Att'y Gen. Fla. 86-91 (1986) and 76-38 (1976) and *Ragucci v. City of Plantation*, 407 So. 2d 932 (Fla. 4th DCA 1981).

⁶ See Inf. Op. Att'y Gen. to Mr. Robert Cintron, Jr., General Counsel, Key West Citizen Review Board, March 22, 2004 (no statutory authority for citizen review board to receive complaints against law enforcement officers under Part VI, Ch. 112, Fla. Stat.).