

**IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT  
IN AND FOR MONROE COUNTY, FLORIDA**

**CITY OF KEY WEST, FLORIDA  
CITIZEN REVIEW BOARD,**

**CASE NO.: 2009-CA-1008-K**

**Plaintiff,**

**vs.**

**PABLO RODRIGUEZ,**

**Defendant.**

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**PLAINTIFF, CITY OF KEY WEST, FLORIDA, CITIZEN REVIEW  
BOARD’S MEMORANDUM OF LAW IN OPPOSITION TO  
DEFENDANT’S, PABLO RODRIGUEZ’S, MOTION TO DISMISS**

The Plaintiff, CITY OF KEY WEST, FLORIDA, CITIZEN REVIEW BOARD (“CRB”) files this Memorandum of Law in opposition to Defendant, PABLO RODRIGUEZ’S (“RODRIGUEZ”) Motion to Dismiss and states:

Defendant moves to dismiss the complaint pursuant to Florida Rules of Civil Procedure 1.140 on three separate legal grounds: 1) there is no delegated authority for the CRB to have subpoena power; 2) the “mandatory provisions” of Chapter 112 of the Florida Statutes preclude the CRB from going forward in its investigation; 3) the failure of the Plaintiff to allege all conditions precedent have been met prior to the issuance of the subpoena here in question.

RODRIGUEZ contends that the citizens of Key West lack the legal authority under the Florida Constitution and the Florida Municipal Home Rule Powers Act (MHRPA) to delegate to the CRB the authority to issue investigatory subpoenas. The motion to dismiss states: “[s]ince Monroe County is not chartered, all the authority granted the City of Key West comes from the Florida Constitution, *Article VIII, §2*; and *F.S. §166.021* [Municipalities]. Motion to Dismiss, p.

2-3. The CRB is at a loss as to why the lack of a Monroe County charter has any bearing on the municipal home rule powers of the City of Key West. It is true that Florida law treats chartered and non-chartered counties differently for home rule purposes. Home rule for chartered counties (other than Miami-Dade County) is governed by Article VIII, §1(g) of the Constitution and Chapter 166, Florida Statutes. On the other hand, home rule for non-chartered counties is governed by Article VIII, §1(f) and Section 125.01, Florida Statutes. However, whether a county is a charter government or not does not seem to matter when analyzing the breadth of home rule powers. *See, Hillsborough County v. Florida Restaurant Association, Inc.*, 603 So. 2d 587, 592 (Fla. 2<sup>nd</sup> DCA 1992)(“It is clear, then, that even if we were reviewing this ordinance in a case where it had been enacted by a non-chartered county, we would reach the same result”). In any event, the undersigned has found no authority to suggest that the home rule powers of a municipality are any different for a municipality located in a non-charter county.

On the other hand, it is clear from Article VIII, §2(b), and §166.021, Florida Statutes, that municipalities in Florida all enjoy the same broad home rule powers:

municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law. . . . Thus, a municipality may now exercise any governmental, corporate, or proprietary power for a municipal purpose except when expressly prohibited by law, and a municipality may legislate on any subject matter on which the legislature may act, except those subjects described in paragraphs (a), (b), (c), and (d) of section 166.021(3).

*City of Boca Raton v. State*, 595 So.2d 25, 28 (Fla. 1992), opinion and holding modified by, *Collier County v. State*, 733 So.2d 1012 (Fla. 1999) and *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So.2d 180 (Fla. 1995). The fact that Monroe County is not chartered has no bearing on the City’s home rule powers, nor on the authority of the City of Key West to delegate

subpoena power to its CRB.

RODRIGUEZ seems to suggest that the municipal home rule powers that are enjoyed by the City of Key West and other municipalities are narrowly prescribed by the Florida Constitution and Florida law, and that the City only may delegate subpoena powers to the CRB if there is a state law or constitutional provision expressly authorizing such a delegation of power. In this regard the motion to dismiss states that the Municipal Home Rule Powers Act “permits a municipality to act. . . .” Motion to Dismiss, p. 3. Officer Rodriguez’s perspective on the breadth of municipal home rule powers is not supported by the case law.

Florida First District Court of Appeal Judge James R. Wolf and his clerk, Sarah Harley Bolinder, have authored an excellent article describing the breadth of local government home rule powers and the doctrines of preemption and conflict that operate to limit local government home rule powers. *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, Florida Bar Journal, Vol. 83, No. 6 (June 2009)<sup>1</sup>. The analysis that follows borrows heavily from that article.

At page 1 of his article Judge Wolf describes the development of home rule in Florida:

Prior to the 1968 revision of the Florida Constitution, local governments had only those powers expressly granted them by law. *See, City of Boca Raton v. State*, 595 So. 2d 25, 27 (Fla. 1992). In 1968, the Florida Constitution was amended to authorize local home rule powers for both cities and charter counties. Fla. Const. art. VIII, §1. The first Florida Supreme Court case discussing the 1968 amendment significantly narrowed the amendment's application and suggested that, unless a city's action was clearly reasonable, any dispute regarding the action should be resolved against the local government. *City of Miami Beach v. Fleetwood Hotel*, 261 So. 2d 801, 803 (Fla. 1972) On the heels of this decision, the legislature, in 1973, enacted the Municipal Home Rules Power Act (MHRPA), now codified in Ch.166 of the Florida Statutes. The MHRPA

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<sup>1</sup> A copy of that article accompanies this memorandum.

guarantees that local governments retain governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services. This power may not be curtailed except as otherwise provided by law. *City of Miami Beach v. Fleetwood Hotel*, 261 So. 2d 801, 803 (Fla. 1972) The MHRPA effectively foreclosed the preexisting presumption that local government action must be narrowly confined to only the immediate needs of the residents. The act further dictated that local governments should be allowed to act if not clearly directed otherwise by the state. Both the Florida Constitution and state statutes express a preference that, absent some necessity for a statewide enactment, local officials should deal with problems relating to the health and welfare of their citizens.

It is in the context of the public policy of favoring an expansive application of home rule powers that this court should evaluate RODRIGUEZ's assertion that giving the CRB subpoena powers runs afoul of municipal home rule authority.

The Municipal Home Rule Powers Act (MHRPA) expressly states that local governments should be able to act unless otherwise provided by law. The courts have interpreted the MHRPA to mean that local government action should only be prohibited if the action is either (1) preempted by state law or the Florida Constitution, or (2) in conflict with state law or the Florida Constitution. *Tallahassee Mem'l Reg. Med. Ctr. v. Tallahassee Med. Ctr.*, 681 So. 2d 826 (Fla. 1st DCA 1996). As discussed below, neither the doctrines of preemption nor conflict bar the home rule authority of the citizens of Key West to amend the City Charter to create the CRB and delegate subpoena power to it.

**THE LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS DOES NOT EXPRESSLY PREEMPT A MUNICIPALITY FROM AMENDING ITS CHARTER TO EMPOWER ITS CITIZENS REVIEW BOARD WITH SUBPOENA POWER.**

As stated above, the expansive powers granted local governments under the MHRPA are

tempered by the doctrine of preemption. That is, if a state law or the Florida Constitution preempts the local government legislation at issue, then under the case law, the local governmental regulation must fall. Preemption may be either express or implied.

The issue of preemption in the case at bar asks whether Florida statutes or the Florida Constitution preempts local government from issuing investigatory subpoenas where an independent board created by local government is investigating police misconduct. Express preemption means just that. This court must ask: “Is their language in the Florida Constitution or Florida law that expressly forbids a citizens review board from issuing subpoenas to police officers?” It is respectfully submitted that the answer is “No.” RODRIGUEZ relies solely on the Law Enforcement Officers’ Bill of Rights (§§ 112.531 through 112.535, Florida Statutes (2009)(“LEO Bill of Rights”) to support his contention that a citizen review board is barred as a matter of state law from possessing subpoena power.

As Judge Wolfe notes, express preemption does not require that the state law in question specifically state that local government regulation in the area of concern is preempted. Rather, the court must look to whether the state law manifests an intent to “occupy the field” of regulation. *Wolfe*, pp. 1-2. For example, in *Florida Power Corp. v. Seminole County*, 579 So. 2d 105 (Fla. 1991), a local government enacted an ordinance requiring that power lines be buried as part of a road expansion. The Supreme Court held that the local ordinance was preempted by state law empowering the Public Service Commission (PSC) to set utility rates. Citing language in state law that the PSC retained the “exclusive and superior . . . power to prescribe fair and reasonable rates and charges,” the court concluded that because burying power lines would create higher operating costs for the regulated utility, which in turn would result in higher utility

rates, the express wording of the statute preempted the local ordinance.

There are no magic words to guide the court in determining whether express preemption exists. The task is to review the state law for phrases indicating the Legislature's intent that the state has exclusive jurisdiction in the subject matter. The language of the statute should make clear that the Legislature intended to preempt any local regulation on the subject. Ultimately, it is a question of interpretation. *Id.*

In *Hillsborough County v. Florida Restaurant Association, Inc.*, 603 So. 2d 587 (Fla. 2<sup>nd</sup> DCA 1992), the issue was whether Florida statutes regulating food safety in restaurants expressly preempted a local ordinance requiring health warning signs in local establishments selling alcohol. The court held that the state regulatory scheme was “not so pervasive that the County has no room to act under its police powers.” The Court explained that “[t]o find a subject matter expressly preempted to the state, the express preemption language must be a specific statement; express preemption cannot be implied or inferred.” *Id.* at 589.

It is noteworthy that in *Hillsborough County* portions of the Florida Statutes regulating food safety expressly preempted local regulation in specified subject areas. The court found that even though certain parts of the statute expressly preempted to the state the “regulation and inspection” of food service establishments, that preemption language made no mention of signage requirements. Therefore, the court found no express preemption regarding local government signage requirements. The court stated: “we cannot construe the [express preemption] language so broadly [as to include signage] . . . ; to do so would give the general words a meaning wholly unrelated to the more specific terms in [the statute]. . . .” *Id.* at 590.

Judge Wolf notes in his article that the cases are “rare” that have found a local ordinance

to be expressly preempted by state law. Judge Wolf reasons that given the constitutional protections afforded local government under Article VIII of the Florida Constitution, “any ambiguity on the issue of express preemption should be resolved in favor of the local government.” *Wolf*, p. 2.

Turning to the case at bar, there is nothing in the LEO Bill of Rights that evinces a clear intent by the Legislature to preempt a citizens review board from being delegated subpoena power by a municipality. §112.532 of the LEO Bill of Rights sets out the rights and privileges that are to be afforded a law enforcement officer who is “under investigation and subject to interrogation by members of his or her agency for any reason that could lead to [an adverse employment action against the officer]. . . .” §112.532(1).

It is clear from the language of the LEO Bill of Rights that a local government that employs a law enforcement officer retains the right to investigate and discipline law enforcement officers employed by that local government. Section 112.523(1)(j) of the LEO Bill of Rights states that “notwithstanding the rights and privileges [enumerated in §112.532(1)], §112.532(1) does not limit the right of an agency to discipline or to pursue criminal charges against an officer.” Section 112.533 of the LEO Bill of Rights sets forth the procedure for the receipt and processing of complaints against LEOs. Section 112.533 (1)(a) states:

Every law enforcement 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 officer . . . and for determining whether to proceed with [an adverse employment action], notwithstanding any other law of ordinance to the contrary.

In 2007, the Legislature, with knowledge that several citizens review boards had been created by local governments in Florida, amended Section 112.533 to add the following in

recognition of civilian review boards: “Any political subdivision [defined as a “separate agency of unit of local government created or established by law or ordinance . . . , and includes, but is not limited to . . . [a] board . . . municipality . . . [or] town . . .] that initiates or receives a complaint against a [LEO] . . . must within 5 business days forward the complaint to the employing agency of the [LEO] who is the subject of the complaint for review or investigation.” §112.533(b)(1). The fact that the Legislature expressly acknowledges the existence of civilian review boards and has amended the LEO Bill of Rights to facilitate the receipt of LEO complaints received directly by civilian review boards, manifests the Legislature’s intent that civilian review boards can coexist with the investigatory procedures established by the bill of rights as implemented by the LEO’s employing agency. If the Legislature intended to preclude civilian review boards from having any involvement in the process, including barring civilian review boards from issuing investigatory subpoenas, when the Legislature amended the bill of rights in 2007, it simply could have barred civilian review boards from the occupying the field. The Legislature chose not to take that action. Accordingly, there is nothing in the LEO Bill of Rights that clearly and expressly manifests the Legislature’s intent to usurp a municipality’s authority to create a civilian review board and empower the board with subpoena power.

Other than the excerpts from the LEO Bill of Rights cited above, there are no other provisions of the LEO Bill of Rights that bear on whether the Legislature has expressed clearly its intent that the procedures set forth in the LEO Bill of Rights were intended to “occupy the field” and are the exclusive means by which local government can police its police. The court stated in *Hillsborough County v. Florida Restaurant Association, Inc.*, “[t]o find a subject matter expressly preempted to the state, the express preemption language must be a specific

statement; express preemption cannot be implied or inferred.”

The Key West City charter provisions that created the CRB expressly requires that the CRB adopt “policies and procedures . . . to ensure compliance with [the LEO Bill of Rights] and . . . other laws. Key West City Charter, 1.07 VIII(d). To that end, the CRB follows the procedures set forth in the Bill of Rights. When a complaint is filed with the CRB it is immediately forwarded by the CRB to the internal affairs division of the police department for investigation. The CRB does not participate in IA’s investigation. It is only after the police department has completed its investigation of the complaint that the CRB, acting solely in an advisory capacity, reviews the results of the investigation and any recommended disciplinary action. By the time the CRB receives the investigatory file from IA (all of which is a public record under Florida law), the officer complained against has been subjected to interrogation by the IA investigators, and presumably was afforded all of the rights and privileges set forth in the LEO Bill of Rights. Any recommendation that the CRB makes in response to an internal affairs investigation is simply advisory and has no binding force or effect.

IF the CRB elects to issue a subpoena to a police officer who has been complained against, under the CRB’s procedures, any such subpoena would only be issued AFTER the complaint has been forwarded to IA for its investigation, and IA has been afforded the necessary time to complete its investigation. The exercise of subpoena power by the CRB does not in any way interfere with IA’s investigation or impinge on the police officer’s rights under the LEO Bill of Rights, nor could it, since the City Charter expressly states that the CRB must comply with the LEO Bill of Rights.

**THE DOCTRINE OF IMPLIED PREEMPTION DOES NOT  
PRECLUDE THE CITIZENS OF KEY WEST FROM  
EMPOWERING THEIR CRB WITH SUBPOENA POWER.**

In the absence of clear and express language in a statute demonstrating the Legislature's intent to preempt local government from legislating in particular subject matter, the courts on very rare occasions have invalidated local government legislation on the basis of implied preemption. *Wolf*, pp. 2, 5-6. Under the doctrine of implied preemption, if a state statute is silent as to express preemption but nonetheless "pervasively" displays an obvious intention to prevent local legislation on the subject matter, then the court may determine that the local legislation is preempted. Judge Wolf observes that "a finding of implied preemption is based on a court's gleaning of legislative intent and can also substantially infringe upon a local government's home rule authority in violation of the direct mandate of the constitutional home rule provision and MHRPA. Thus, a finding of implied preemption should be confined to a very narrow class of cases in which the state has legislated pervasively. . . ." *Id.*, p. 2.

The leading cases on the implied preemption doctrine are *Santa Rosa County v. Gulf Power Co.* 635 So. 2d 96, 101 (Fla. 1<sup>st</sup> DCA 1994)("Implied preemption occurs if a legislative scheme is so pervasive that it occupies the entire field, creating a danger of conflict between local and state laws.") and *Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center, Inc.*, 681 So. 2d 826, 831 (Fla. 1<sup>st</sup> DCA 1996). In *Tallahassee Memorial* the Court warned that

[i]mplied preemption, however, is a more difficult concept. The courts should be careful in imputing an intent on behalf of the Legislature to preclude a local elected governing body from exercising its home rule powers. Implied preemption should be found to exist only in cases where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.

The scope of the preemption should also be limited to the specific area where the Legislature has expressed their will to be the sole regulator.

As noted by Judge Wolf, recent case law shows that the courts are shrinking from the doctrine of implied preemption. *Pinellas County v. City of Largo*, 964 So. 2d 847, 853-54 (Fla. 2d DCA 2007) (rejecting use of implied preemption where the state legislation was not so pervasive as to evidence an intent to be the sole regulator); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1019-20 (Fla. 2d DCA 2005) (finding that state fireworks regulation was not so pervasive as to suggest implied preemption); *GLA & Assoc., Inc. v. City of Boca Raton*, 855 So. 2d 278, 282 (Fla. 4th DCA 2003) (finding that the Florida Beach and Shore Preservation act did not so pervasively legislate the area of beach conservation as to preempt local protective ordinances); *Palm Beach County v. Bellsouth Telecomm., Inc.*, 819 So. 2d 876, 878 (Fla. 4th DCA 2002) (finding that local ordinance charging Bellsouth a land occupation fee was not impliedly preempted by state legislation); *Lowe v. Broward County*, 766 So. 2d 1199, 1207 (Fla. 4th DCA 2000) (finding that a county ordinance recognizing domestic partner relations and allowing for benefits to be paid to domestic partners of county employees was not impliedly preempted by state marriage laws), *rev. denied*, 789 So. 2d 346 (Fla. 2001).

In fact, since the *Tallahassee Memorial* decision, only one appellate court has found that a local government ordinance was barred by implied preemption. *Browning v. Sarasota Alliance for Fair Elections*, 968 So. 2d 637 (Fla. 2<sup>nd</sup> DCA 2007) (“Our review of the provisions of the Election Code and the proposed SAFE amendment leads us to conclude that the Election Code impliedly preempts the SAFE amendment given the Election Code's pervasive regulatory scheme and the public policy mandate for uniformity. Pursuant to the Florida Constitution, the Legislature has been directed to enact laws regulating the election process”).

**DELEGATING SUBPOENA POWER TO THE KEY WEST CRB  
THROUGH AN AMENDMENT TO THE CITY CHARTER  
DOES NOT CONFLICT WITH STATE LAW OR THE CONSTITUTION.**

The second grounds on which local government legislation can be invalidated is that the local law conflicts with either state law or the Florida Constitution. In order for local legislation to be struck down based on conflict, it must be shown that the state law and local legislation cannot coexist. In other words, the local legislation will be invalidated where one must violate one provision in order to comply with the other. *Lowe v. Broward County*, 766 So. 2d 1199, 1206-7 (Fla. 4<sup>th</sup> DCA 2000); *Jordan Chapel Freewill Baptist Church v. Dade County*, 334 So. 2d 661 (Fla. 3<sup>rd</sup> DCA 1976)(“Legislative provisions are inconsistent if, in order to comply with one provision, a violation of the other is required. . . . Courts are therefore concerned with whether compliance with a County ordinance requires a violation of a state statute or renders compliance with a state statute impossible”).

Essentially, a conflict between a local ordinance and state law should only be found to exist where the local legislation frustrates the purpose of a state law or the Constitution, and should only be found to exist in rare cases where a local government has overreached its power. *Wolf*, p. 3.

As discussed above, neither the charter provision creating the Key West CRB, nor the grant of subpoena power to the CRB, conflicts with the LEO Bill of Rights in the sense that the issuance of an investigatory subpoena by the CRB frustrates the LEO Bill of Rights or results in a violation of the LEO Bill of Rights. The protections afforded a Key West police officer under the bill of rights remain intact despite the issuance of a subpoena to that officer by the CRB.

**THE THIRD DCA’S DECISION IN *BARRY V. GARCIA*  
DOES NOT PRECLUDE THE CITIZENS OF KEY WEST FROM  
AMENDING THE CITY CHARTER TO DELEGATE SUBPOENA  
POWER TO A CITIZENS REVIEW BOARD CREATED BY THEM.**

Both Officer Rodriguez and the CRB rely on the Third DCA’s decision in *Barry v. Garcia*<sup>2</sup> to support their legal positions. In analyzing the applicability of *Barry v. Garcia* to the present case, this Court is invited to consider a fundamental factual distinction between the present case and *Barry v. Garcia*. As discussed at length earlier in this memorandum, the Key West CRB was created through an amendment to the city charter by a referendum of the citizens of Key West held in compliance with the city charter. It was the citizens of Key West who delegated subpoena power to the CRB. On the other hand, in *Barry v. Garcia* the City commissioners by resolution delegated their subpoena power to a non-elected board with no input from the citizens of the City of Miami. As discussed below, the CRB believes that the fundamental difference between the facts of the present case and in *Barry v. Garcia* is the mechanism by which subpoena powers were delegated in the present case as opposed to the delegation of subpoena power in *Barry v. Garcia*.

As a result of severe racial tensions arising out of several police actions in Dade County, the City Commission of the City of Miami adopted a Resolution<sup>3</sup> creating an Ad Hoc Independent Review Panel(the “Miami Review Panel”). The Miami Review Panel was charged with the responsibility of investigating and reviewing the community relations between police

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<sup>2</sup> 573 So. 2d 932 (1991), *rev. denied*, 583 So. 2d 1034 (Fla. 1991).

<sup>3</sup> As discussed in detail later, the use of a resolution, as opposed to an ordinance or amendment to the Miami city charter, was determinative in the Third DCA’s mind on the issue of the Miami Review Panel’s subpoena power.

officers and the residents of Overtown. The Miami Review Panel consisted of non-elected officials from the Miami community, and most importantly to the present case, was given the power to issue investigatory subpoenas. The Miami Review Panel issued and then attempted to enforce in the circuit court subpoenas issued to the Hispanic Officers Association and a City of Miami police officer. The Dade County Circuit Court found as a matter of law that the Miami Review Panel did not have the authority to issue subpoenas and to compel the attendance of witnesses to its proceedings. The Third DCA affirmed.

In affirming the Circuit Court's ruling that the Miami Review Panel could not lawfully issue subpoenas, the Third DCA stated:

[A] citizen may not be held in contempt and thereupon punished on failing or refusing to obey any subpoena, process, or order of any administrative agency until after he shall have first been afforded an opportunity for a hearing before a court of competent jurisdiction *and* until that court shall have ordered obedience to such subpoena, process or order and such court order shall have been disobeyed. *State ex rel. Greenberg v. Florida State Board of Dentistry*, 297 So.2d 628, 632 (Fla. 1st DCA 1974). Therefore, there must be a clear authority to either issue a subpoena by municipal officials in the first instance or for them to delegate this power to nonelected persons. **If the city opts to change the manner in which subpoena power is to be exercised, including the power to delegate same to a citizen board such as the Ad Hoc Independent Review Panel, then such change must be accomplished in accordance with the provisions of the Charter and the Municipal Home Rule Powers Act; i.e., by a referendum of the electors of the city.** The creation of the review panel in the instant case, is not within the specific group that is authorized under the charter to receive subpoena powers, therefore the attempted delegation is unauthorized.

*Barry* at 937-938 (emphasis added).

In the present case, unlike in *Barry v. Garcia*, the citizens of Key West voted in a lawful referendum to amend the City Charter to create the Key West CRB and expressly authorized the CRB to issue subpoenas. The very document that forms the fundamental legal basis on which the City of Key West operates — the city charter — is the basis on which the subpoena power

was created and delegated by the citizenry to the CRB. Therefore, the deficiencies noted by the Third DCA in *Barry v. Garcia* in determining that the Miami Review Panel did not have the legal authority to issue subpoenas, do not exist in the present case.

Whether the decision in *Barry v. Garcia* is binding on this Court or simply persuasive authority, requires an analysis of home rule powers in Florida. That is because the City of Miami derives its home rule powers from a different source than other municipalities (including Key West) in Florida.

Prior to the 1968 revisions to Florida's Constitution, local governments only had those powers expressly granted them by the Constitution and the Florida Legislature. This led to a plethora of local and special bills in the Florida Legislature empowering local governments to act on behalf of their residents. The 1968 revisions to the Florida Constitution created Article VIII,<sup>4</sup> authorizing local home rule powers for both cities and charter counties. In 1973, the Florida Legislature in response to a Florida Supreme Court decision that narrowed application of Article VIII to local governments, enacted the Municipal Home Rule Powers Act (MHRPA), now codified in Chapter 166, Florida Statutes. While the Constitutional home rule powers and the MHRPA applies to most municipalities and counties in Florida, Dade County and its municipalities were expressly excluded for historical reasons.

As discussed in detail in the *Barry* decision, when home rule was first made applicable to Florida counties and cities in 1968 with the revisions to Florida's Constitution, and later codified

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<sup>4</sup> Article VIII, Section 2 (b): "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective".

in 1973 with the enactment of MHRPA, Dade County and its municipalities were already enjoying home rule powers. Dade County and its municipalities (for political reasons) were given home rule powers pursuant to Article VIII, Section 11 of the Florida Constitution of 1885 as amended in 1956. The 1956 amendment was approved by Florida voters in 1956 and the electorate approved the Dade County Home Rule Charter the following year. Under the Dade County Home Ruler Charter of 1957, Dade County was granted county government power over local affairs within Dade County; with the requirement that each municipality within Dade County (including the City of Miami) would enjoy home rule under individual municipal charters.

The stated objective of the 1956 home rule amendment to the Constitution and the 1957 Dade County Home Rule Charter was to transfer the power the Legislature had in passing local bills and special laws applicable only to Dade County, from the state to Dade County and to the municipalities in Dade County. The goal of that legislation was to “create a metropolitan government to serve our present and future needs, and to endow our municipalities with the rights of self determination in their local affairs. . . .”

When Florida amended its Constitution in 1968, and later the Legislature enacted the MHRPA giving home rule powers to the rest of the state, the 1968 revisions to the Constitution and the MHRPA expressly excluded Dade County and its municipalities. That is because Dade County and its municipalities were already enjoying the benefits of home rule since 1957.<sup>5</sup>

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<sup>5</sup> Under the 1968 amendments to the Florida Constitution Dade County and its municipalities continue to enjoy their home rule powers pursuant to the 1956 amendments to the Florida Constitution and the Dade County Home Rule Charter until such time as Dade County shall adopt a charter or home rule plan pursuant to the home rule provisions of the 1968 amendments to the constitution. Miami-Dade County has opted not to take that action since the effective date

Returning to the holding in *Barry v. Garcia*, in light of the dichotomy between municipal home rule in the rest of Florida (including Key West) under the MHRPA and City of Miami home rule under the 1957 Dade County Home Rule Charter, this court should ask whether the *Barry* decision can be distinguished from the case at bar because *Barry* was decided under the City of Miami home rule charter and not the MHRPA that is applicable to the City of Key West? The CRB would submit that the holding in *Barry v. Garcia* has equal application to the CRB charter amendment here at issue. The broad home rule powers enjoyed by the City of Miami under its unique home rule powers are just as broad as the home rule powers enjoyed by the City of Key West under the MHRPA. The CRB submits that had the City of Miami **enacted an ordinance or amended its charter** to delegate subpoena power to its Miami Review Panel the result in *Barry v. Garcia* would have been different. In fact, in the *Timoney* decision discussed at length below, the City of Miami vested its civilian review board with subpoena power not by use of a resolution; rather, the City of Miami enacted an ordinance. That is a distinction that makes a difference.

It is important to note that in the *Barry* decision the Third DCA discussed the general authority of a municipality to issue subpoenas incident to the performance of its municipal functions. The court observed: “[g]enerally a municipality derives its power of subpoena in connection with its power to legislate. *Id.* at 936.

In summary, neither the doctrines of preemption nor conflict bar the citizens of Key West from amending the city charter to authorize the Key West CRB to issue subpoenas and to seek the enforcement of the same.

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of the 1968 amendments.

**THE CRB HAS THE LAWFUL AUTHORITY TO CONDUCT  
INDEPENDENT REVIEWS OF POLICE MISCONDUCT AND  
TO USE ITS SUBPOENA POWER AS NECESSARY.**

The Florida Third District Court of Appeals has ruled that the LEO Bill of Rights does not preclude independent civilian review board investigations into a police officer's conduct. *Timoney v. City of Miami Investigative Panel*, 900 So. 2d 614 (Fla. 3<sup>rd</sup> DCA 2008) (Court ruled that Chief of Police must respond to an issued subpoena from this independent complaint review board as this board was conducting an independent outside investigation of his conduct that was prompted by a complaint filed with the Civilian Investigative Panel (CIP)). It must be noted that the City Ordinance, Chapter 11.5, which created the CIP, describes its purposes, powers and duty is generally parallel to section 1.07 the Charter of the City of Key West which creates and empowers an independent CRB “...with authority to review and/or investigate complaints involving Key West police officers.” K.W. City Charter 1.07 I(a).

In *Timoney*, the CIP received a complaint of alleged misconduct against Chief Timoney and pursuant to the Enabling Ordinance commenced an independent investigation. In the present case, the CRB received a complaint from a third party and commenced an independent investigation of RODRIGUEZ'S conduct pursuant to section 1.07 of the City Charter as alleged in paragraph 7, 8 & 9 of the CRB Complaint. As in *Timoney*, RODRIGUEZ has refused to voluntarily respond to the CRB, nor appear when subpoenaed to answer questions by the CRB to further the CRB investigative efforts as alleged in paragraphs 8 & 10 of the CRB Complaint.

In *Timoney*, the court concluded that “Chapter 112 does not apply to an *independent, external* investigation, where the CIP's Enabling Ordinance provides that any sworn police officer is subject to an independent investigation by the CIP.” [emphasis added by the court] *Id.*

at 619. The court further explained its rationale in upholding the CIP's subpoena power and authority to investigate a sworn law enforcement officer of the City of Miami's police force (Chief Timoney) by stating "[a]ccordingly, Chief Timoney is not exempt from the CIP's authority because the CIP is not following up on an internal affairs investigation pursuant to Chapter 112, from which Timoney is exempt, rather, the CIP is conducting its own, independent external investigation, and Chief Timoney is not exempt" *Id.* at 619. <sup>6</sup>

*Timoney's* holding is in harmony with the Florida Legislature's intent and the expressed public purpose of the LEO Bill of Rights. When Florida courts are tasked with determining the meaning of an ambiguous statute, "legislative intent is the polestar by which the court must be guided." *Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Admin. Hearings*, 686 So.2d 1349, 1354 (Fla.1997) (quoting *State v. Webb*, 398 So.2d 820 (Fla.1981)). As explained in *Longo v. City of Hallandale*, 42 Fla. Supp. 53, 57 (17<sup>th</sup> Judicial Cir. Broward Co.), *affirmed City of Hallandale v. Longo*, 331 So.2d 397 (Fla. 4<sup>th</sup> DCA 1976), *cert. denied*, 341 So.2d 1080 (Fla. 1976), the legislative intent of the LEO Bill of Rights was NOT to

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<sup>6</sup> RODRIGUEZ heavily relies on *Demings v. Orange County*, 34 F.L.W. D1085 (Fla. 5<sup>th</sup> DCA, May 29, 2009) opinion filed May 29, 2009) which dealt with the Orange County CRB attempting to question, via a subpoena, a deputy who was an employee of the constitutionally-appointed sheriff of Orange county. That particular case recognizes that: 1) there is a difference between a sheriff's deputy being subpoenaed by a county CRB and a municipal police officer being subpoenaed by a municipal CRB; and 2) its own logic may conflict with *Timoney* by stating in footnote #8 the following

*Timoney does contain language suggesting that nothing in chapter 112 prohibits an "independent, external investigation" by a local governing board of a complaint against a law enforcement officer. If this was an intended conclusion in Timoney, we believe it to be in error -- as inconsistent with the plain language of section 112.533. Again, however, the argument based upon section 112.533 does not appear to have been made in Timoney. Additionally, Timoney did not involve the relationship between a local governmental body and an independent constitutional officer. Rather, that case involved a city's authority to investigate its own employee.*

If there is an unresolved conflict between the district courts in Florida, the trial court is bound by precedent in its own appellate district. See *Miller v. State*, 980 So.2d 1092 (Fla. 2nd DCA 2008) citing *Pardo v. State*, 596 So.2d 665, 666-667 (Fla. 1992).

prevent outside agency investigations of police misconduct; rather, the LEO Bill of Rights applied only to internal investigations by the police department. *Id.* at 57. In fact, the first draft of the subject legislation was modified so that the legislative intent to allow for outside, independent investigations by other agencies was fulfilled by the removal of the specific language “or any other investigative agency” from Sec. 112.531(1).<sup>7</sup> *Id.* at 57-58. The *Longo* trial court stated:

It can be seen from the foregoing summary that the purpose of the act is to protect a police officer from arbitrary and unreasonable interrogation and investigation by superior officers whom he is otherwise in no position to resist. It is also clear from the legislative debates that the act was intended to apply only to *intradepartmental* interrogation and investigation, and had as its purpose the protection of subordinate officers from “third degree” tactics by superior officers, especially in jurisdictions where the subordinate officer was not protected by civil service. (citing legislative proceedings of the Florida Senate and House of Representatives) [emphasis added by the court]

The Longo’s trial court’s interpretation of legislative intent of Chapter 112 and its non-application to external, independent investigations, was affirmed *per curiam* by the Fourth District Court of Appeal. The public purpose and legislative intent of the LEO Bill of Rights would not be served if this court adopts RODRIGUEZ’S argument that independent civilian police oversight boards, which operate in the sunshine at public meetings like the CRB, are barred by the LEO Bill of Rights and should be stripped of their authority to investigate and issue subpoenas.

Further, because RODRIGUEZ’ superior officers are not involved in the CRB public

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<sup>7</sup> As originally drafted, F.S. 112.531(1) which defines its application, read as follows: “Whenever a law enforcement officer is under investigation and is subject to interrogation by members of his or any other investigative agency, for any reason which could lead to disciplinary action, demotion, [or] dismissal, or criminal charges, such interrogation shall be conducted under the following conditions...” However, by Florida Senate and House amendments, the portions underlined were purposefully deleted to allow outside agency regulation of-police conduct in conjunction with the officer’s own police internal affairs. *Id.* at 57-58

questioning or investigation of RODRIGUEZ, his argument that the LEO Bill of Rights bars the CRB's investigative efforts is wrong. The protections of F.S. 112.532(1) apply only "[w]henever a law enforcement officer or correctional officer is under investigation and subject to interrogation by members of his or her agency for any reason which could lead to disciplinary action, demotion, or dismissal, such interrogation shall be conducted under the following conditions." [Emphasis added] The CRB is not using Key West Police Officers in its investigation and questioning of RODRIGUEZ. The CRB members and staff will conduct the questioning of RODRIGUEZ as alleged in paragraph 9 of the CRB Complaint and the attached subpoena to the CRB Complaint. As the court in *Timoney* explained:

Chapter 112 concerns internal investigations conducted by a police department of its own officers. The pertinent portions of Chapter 112 are sections 112. 531 and 112. 532, Florida Statutes (2007). Section 112. 532, known as the "Police Officers' Bill of Rights," describes the rights and privileges of all law enforcement officers and correctional officers, and imposes conditions for investigation, "whenever a law enforcement officer or correctional officer is under investigation and subject to interrogation *by members of his or her agency* for any reason which could lead to disciplinary action, demotion or dismissal . . . " That section sets forth the procedures to be followed *by the police department* for interrogation of a law enforcement officer under investigation *by the police department*. See § 112. 532(1)-(6), Fla. Stat. (2007). Section 112. 531(1) defines "law enforcement officers" for the purposes of Chapter 112 internal investigations to include any person, other than the chief of police, who is employed full time by any municipality and whose primary responsibility is the prevention of crime.<sup>FN4</sup> The chief of police is, therefore, exempt from an internal police department investigation. The CIP's authority, however, extends to independent, external investigations, from which the chief of police is not exempt. *Id.* at 618-619. [all emphasis added by court]

The *Timoney* court's common sense reading of the language of the LEO Bill of Rights to limit its application only to internal investigations by the police department also has been the analysis given by others who have been asked to comment on the breadth of the statute. See Fla. AGO 75-41 (Chapter 112 procedures apply to the department or agency that the officer

works for and “not to the municipality or the state or subdivision thereof which employs him . . . the statute does not apply to any investigations by a city council as long as fellow law enforcement officers are not used as interrogators. Even if the city council does use such officers as interrogators, the act would apply only if the interrogation could lead to disciplinary action, demotion or dismissal”); *Longo* at 58.

Further, section 1.07(I)(a) & (b) of the Charter Provision of the City of Key West (attached to the CRB Complaint as an exhibit) clearly reveals that the CRB only has advisory authority and thus cannot render “discipline, demotion or dismissal...” which is another condition before F.S. 112.532(1) protections go into effect. In the City of Key West, powers to “discipline, demotion or dismissal” rests only with the City of Key West Police Chief and City Management. The Legislature’s limiting language used in F.S. 112.532(1) confining its application to instances where “discipline, emotion or dismissal” of an officer is at stake, should not be embellished and expanded by this court to preclude CRB independent investigations as RODRIGUEZ contends. *See generally, Johnson v. Taggart*, 92 So.2d 606 at 608 (Fla. 1957). (Courts are not the proper body to “embellish the legislative requirements with our notions of what might be fair or morally just in particular situations”).

Civilian Review Boards have been in existence throughout the history of the LEO Bill of Rights and its many amendments. The National Association of Civil Oversight of Law Enforcement Organization (NACOLE) reports nationwide various civilian oversight bodies with various degrees of authority. See [www.nacole.org](http://www.nacole.org). The US Department of Justice have recognized and appreciated the importance of the outside civilian oversight boards<sup>8</sup> with various

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<sup>8</sup> See generally, Finn, P. , CITIZEN REVIEW OF POLICE: APPROACHES & IMPLEMENTATION, U.S. DEPT. OF JUSTICE’S NATIONAL INSTITUTE OF JUSTICE, MARCH 2001.

degrees of authority. Other state courts have validated civilian police oversight board's authority to independently investigate their local law enforcement agencies via subpoena power. *See for example Las Vegas Police Protective Assoc. v. Eighth Judicial Circuit*, 130 P.3d 182 (Nev. 2006) (Citizen complained of false arrest and harassment in a complaint to the advisory review board and the court held that the board had jurisdiction and issued a valid subpoena directing the officer to appear before the panel); *Berent v. City of Iowa*, 738 N.W. 2d 193 (IA. 2007) (Proposed city charter amendment establishing a permanent police citizens review board with subpoena powers was a valid proposal which was not preempted by state law.)<sup>9</sup>; *Dibb v. County of San Diego*, 884 P.2d 1003 (Cal. 1994) (Subpoena power conferred to county's civilian review board to investigate sheriff's deputies by county charter was not outside legitimate authority of the charter) *but see, City & County of Denver v. Powell*, 969 P.2d 776 (Co. App. 2<sup>nd</sup> Div. 1999) (Police Citizens review commission subpoenaed police officers but could not compel them to testify if they invoked their 5<sup>th</sup> Amendment privilege).

There are several civilian review boards in Florida which include the City of Orlando, City of Fort Lauderdale, City of Miami, Miami-Dade County, City of St. Petersburg. Of these, the City of Miami and the City of Key West are vested with subpoena powers in their city charters.

The foregoing is relevant to this court's analysis of the Florida LEO Bill of Rights because the Florida Legislature has amended the LEO Bill of Rights no less than 10 times since its creation in 1974 with the latest amendment occurring in July 2009. The Legislature surely knew of the existence of the *Timoney* case decided in 2008, the nationwide acceptance of

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<sup>9</sup> Ultimately the voters did put in place such a civilian police review board in Iowa City with subpoena powers. See Iowa City Code Title VII, Chap. 8 et seq.

independent investigative boards throughout the USA, and the existence of the Key West CRB and Miami CIP with independent subpoena powers. However, the Legislature has chosen **NOT** to expressly invalidate civilian review boards or to eliminate their independent investigative authority. In fact, in 2007 the Legislature amended the LEO Bill of Rights S. 112.533(1)(b)(1) to acknowledge the existence of these separate municipal boards, and at the same time refrained from divesting them of their independent investigatory authorities other than simply requiring such boards to forward the complaint against an officer to that officer's employing agency for investigation. The 2007 amendment to the LEO Bill of Rights should not be read to abolish civilian review boards, nor to divest them of their independent investigatory authority as described eloquently in the *Longo* decision *Ratio legis est anima legis*. (The reason of the law is the soul of the law).

The Florida Legislature refusal to outlaw independent, civilian review boards, reveals the Legislature's intent to continue to allow them to function "in conjunction with" the provisions of the LEO Bill of Rights and allow separate, parallel investigations by the officer's employing agency. *See Ragucci v. City of Plantation*, 407 So.2d 932 (4<sup>th</sup> DCA 1981) (Court held that procedures in the city charter relating to disciplining city's police officers were not vitiated by the LEO Bill of Rights and should be followed). In a special concurring opinion in *Ragucci*, Judge Anstead explained:

I concur completely in the majority opinion. Stated simply, the city has the authority to determine the conditions of employment of its employees including the grounds and manner of termination of employment. Under the provisions of Section 15 of the city's charter authority was vested in the city council to terminate the employment of city police officers. Chapter 112 of the Florida Statutes does not purport to supersede municipal charter provisions such as that involved herein.

*Id.* at 936; See also generally *Smith v. Town of Golden Beach*, 403 So.2d 1346 (Fla. 3<sup>rd</sup> DCA 1981) (Court held that unless expressly stated, a city's procedures in terminating police officers not eliminated by the LEO Bill of Rights).

Rhode Island's high court has come to the same conclusion that its state's "Officer's Bill of Rights" does not preclude outside, independent investigations by civilian oversight boards and these boards can exist in conjunction with strict procedural statutory frameworks which vest police agencies with obligations to investigate their own. See *Providence Lodge No. 3, Fraternal Order of Police v. Providence External Review*, 951 A.2d 497 (RI 2008) (City's creation of a civilian review authority to review complaints against police officers was not preempted by the state's LEO Officer's Bill of Rights which set out detailed procedural guarantees for an officer who may be subject to discipline by their own agency, and thus the ordinance was properly enacted under the Home Rule Amendment of the state constitution because the civilian board was not a law enforcement agency and had no authority to impose discipline on officers). In *Providence External Review*, the Rhode Island Supreme Court was interpreting Rhode Island's General Law 1956 Sec. 42-28.62 9 (Rhode Island's Officer's Bill of Rights) which also has similar conditional language found in F.S. 112.532 as follows:

"Conduct of investigation," provides in part:

Whenever a law enforcement officer is under investigation or subjected to interrogation by a law enforcement agency, for a non-criminal matter which could lead to disciplinary action, demotion, or dismissal, the investigation or interrogation shall be conducted under the following conditions...

*Id.* at 503.

The court recognized that the independent investigations were not conducted by the officer's agency and also would only result in recommendations and not "disciplinary action,

demotion or dismissal” and thus the civilian oversight board could legally operate outside the state’s Officer’s Bill of Rights framework. *Id.* 503-509. The court held that the Rhode Island’s Officer Bill of Rights does not preempt local municipal’s creation of an independent citizen police oversight board with investigative powers to render recommendations. *Id.*

Finally, RODRIGUEZ asserts that the provisions of the LEO Bill of Rights are exclusive and “mandatory” and divests th CRB of its authority to investigate and issue subpoenas. Such an application of the LEO Bill of Rights would be unconstitutional, as applied to the facts of this case. The voters of Key West amended the city charter to create the CRB and clothe it with independent investigative powers. In as sense, the actions of the voters of Key West in creating the CRB via a charter amendment was their means of allowing those aggrieved by police misconduct to petition their local government to address their grievances. In the case at bar, an individual has petitioned this governmental body (CRB) with a grievance (alleging improper actions by RODRIGUEZ) as explained in paragraph 7 of the CRB complaint. Ignoring the voter’s will, and this third party’s petition to the CRB to carry out its independent investigative functions with the subpoena power, would be tantamount to voiding the public’s right to “petition for redress of grievances” in violation of First Amendment to the US Constitution and Declaration of Rights, Art. I, section 5, of the Florida Constitution.

Construing tthe LEO Bill of Rights in a manner that would abridge the fundamental right of a citizen to petition his government for redress would not be the first time that an interpretation of the LEO Bill of Rights as advocated by law enforcement has run afoul of the United States Constitution. See *Cooper v. Dillon*, 403 F.3d 1208 (11<sup>th</sup> Cir. Ct App. 2005), *rehearing and rehearing en banc denied*, 147 Fed. Appx. 156, 2005 WL 1489. (Criminal

provisions of the LEO Bill of Rights did not pass constitutional muster under strict scrutiny because the state's interest was not sufficiently compelling to justify abridgement of First Amendment rights to speak, publish, and petition government by statute prohibiting disclosure of nonpublic information obtained by participant in internal investigation of law enforcement officer). A fundamental Constitutional right to petition one's government "for redress of grievances" and the creation of the CRB for such a process is at stake in this case and strict scrutiny applies. The court must not adopt the RODRIGUEZ's argument that the LEO Bill of Rights is "mandatory" and that it voids the CRB's independent investigative authority. Applying the LEO Bill of Rights to void the authority of the CRB to independently investigate RODRIGUEZ, would be tantamount to silencing the voice of the public and disenfranchising the citizenry of Key West from petitioning their own government for their redress of grievances.

**THE CRB CHARTER PROVISION REQUIRING THAT THE CRB'S ATTORNEY MUST REVIEW A SUBPOENA BEFORE IT IS ISSUED IS NOT A CONDITION PRECEDENT TO THE COMMENCEMENT OF THIS ACTION.**

In one sentence under the heading "MISCELLANEOUS" and without any citation to authority or to specific provisions of the CRB charter amendment, RODRIGUEZ states that "[t]he Plaintiff has failed to indicate that all conditions precedent to the issuance of the subpoena have been met as specified in the charter amendment attached to the complaint. Motion to Dismiss p. 5.

Presumably RODRIGUEZ is referring to CRB charter provision 1.07 1(d) that states: "The CRB may subpoena witnesses and documents when conducting an investigation as follows: (1) A request for a subpoena must be reviewed by the CRB attorney; (2) the CRB attorney may

or may not approve the request after consulting with the State Attorney's Office. . . .”

The undersigned has found no cases on point as to whether the charter provisions excerpted above would constitute a condition precedent to the commencement of the instant action to enforce A subpoena. As a general rule, all conditions precedent to the commencement of an action must be pled generally pursuant to Rule 1.120(c), Florida Rules of Civil Procedure. The failure to plead that all conditions precedent have been met can serve as a basis for a motion to dismiss under Rule 1.140.

In *Covelli Family, L.P. v. ABG5, L.L.C.*, 977 So. 2d 749, 753 (Fla. 4<sup>th</sup> DCA 2008), the court stated: “As a general rule, conditions precedent are not favored, and courts will not construe provisions to be such, unless required to do so by plain, unambiguous language or by necessary implication.” *In re Estate of Boyar*, 592 So.2d 341, 343 (Fla. 4<sup>th</sup> DCA 1992) (citing 17A Am.Jur.2d *Contracts* § 471 (1991)); *see also Gunderson v. Sch. Dist. of Hillsborough County*, 937 So.2d 777, 779 (Fla. 1<sup>st</sup> DCA 2006) (holding provisions of a contract will be considered conditions precedent or subsequent only where the express wording employs conditional language (citing *In re Estate of Boyar* )”. In addition to pleading conditions precedent in a contract action, the general rule is that if a statute sets forth a condition as a prerequisite to a party's right to institute legal proceedings for a particular cause of action, the pleader, relying upon the statutory cause of action, must allege compliance with the statutory prerequisites. *San Marco Contracting Co. v. State Dept. of Transportation*, 386 So. 2d 615, 617 (Fla. 1<sup>st</sup> DCA 1980).

The charter provision's requirement that the CRB attorney must “review” a subpoena before it is issued by the CRB, and giving the CRB attorney discretion not to approve a CRB

subpoena, does not rise to the level of the type of condition contemplated by Rule 1.120(c) and the Florida courts that must be pled as a condition precedent. The fact that the CRB attorney's name is on the subpoena issued to RODRIGUEZ would tend to belie the implied assertion in the motion to dismiss that the CRB attorney did not "review" the subpoena before it was issued.

In short, there is no condition precedent to the commencement of this action that must be pled.

**WHEREFORE**, the Plaintiff requests this court deny the Defendant RODRIGUEZ's Motion to Dismiss and require the Defendant to plead to the Complaint.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of this document was furnished by:

United States Postal Service First Class Mail,  Facsimile Transmission (954.791.2141),

Hand delivery,  E-Mail, and/or  Express Courier, to **RHEA P. GROSSMAN, ESQ.**,

2650 West State Road 84, Suite 103, Ft. Lauderdale, Florida 33312, this \_\_\_\_\_ day of

\_\_\_\_\_ 2009.

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ROBERT CINTRON, JR.