

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

CIVIL DIVISION

CASE NO. 2009-CA-1008-K

CITY OF KEY WEST, FLORIDA  
CITIZEN REVIEW BOARD,

Plaintiff,

v.

PABLO RODRIGUEZ,

Defendants.

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**MOTION TO DISMISS on behalf of PABLO RODRIGUEZ**  
**And incorporated Memorandum of Law**

PABLO RODRIGUEZ, a Defendant herein, through undersigned counsel and pursuant to *Florida Rule of Civil Procedure 1.140*, moves to dismiss the complaint filed against him and states:

**BACKGROUND:**

The following facts are on the face of the complaint and attached exhibits to the complaint.<sup>1/</sup>

Defendant, SERGEANT PABLO RODRIGUEZ, at all times, was and is a sworn law enforcement officer employed by the City of Key West.

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<sup>1/</sup> Rule 1.130, *Florida Rules of Civil Procedure* provides that "[a]ny exhibit attached to a pleading shall be considered a part thereof for all purposes." *Fladell v. Palm Beach County Canvassing Board*, 772 So.2d 1240 (Fla. 2000); *A.S.J. Drugs, Inc. v. Berkowitz*, 459 So.2d 348 (Fla, 4<sup>th</sup> DCA 1984).

The Citizens Review Board began an investigation relative to a search warrant affidavit executed by Sergeant Pablo Rodriguez during the arrest of Omar "Brown, while Sgt. Rodriguez was acting in his official capacity as a sworn police officer.

On February 9, 2009, the Citizens Review Board issued a subpoena to Sergeant Pablo Rodriguez, returnable April 27, 2009, to testify before the Board's members.

Sgt. Rodriguez did not appear before the Board on April 27, 2009.

On June 17, the Citizens Review Board filed the present suit to enforce its subpoena.

**THE LAW:**

Whether a complaint is sufficient to state a cause of action is an issue of law. In order to state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief. A court may not go beyond the four corners of the complaint and must accept the facts alleged therein and exhibits attached as true. *Belcher Center, L.L.C. v. Belcher Center, Inc.*, 883 So.2d 338 (Fla. 2d DCA 2004); *Atkins v. Topp Telecom, Inc.*, 873 So.2d 397 (Fla. 4th DCA 2004).

The Plaintiff is seeking to enforce a subpoena in accordance with the City of Key West charter amendment establishing the CRB. This procedure is equitable in nature and is governed by *F.S. §26.012(2)(c)* and (3). *Crapo v. HCA, Inc.*, 968 So.2d 54 (Fla. 1<sup>st</sup> DCA 2007); *Sirgany International, Inc. v. Miami-Dade County*, 887 So.2d 381 (Fla. 3d DCA 2004).

**1. There is no delegated authority for the CRB to have subpoena power:**

Municipalities have only such powers as are granted them by the legislature in express terms or arise by implication as an incident to powers expressly granted. Since Monroe County

is not chartered<sup>2/</sup>, all the authority granted to the City of Key West comes from the *Florida Constitution, Article VIII, §2*; and *F.S. §166.021* [Municipalities].

The City of Key West Charter contains no investigative and subpoena power for any of its elected officials and/or city employees and administrators. As noted in *Barry v. Garcia*, 573 So.2d 932 (Fla. 3d DCA 1991), 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. Then, if the city opts to change the manner in delegating the power to another entity of an independent board, the change must be accomplished with the passage of an ordinance.

Regardless of the passage of an ordinance, **there must first be the existence of the power by municipal officials.**

The Municipal Home Rule Powers Act<sup>3/</sup> permits a municipality to act if (1) it is exercising its authority for a valid municipal purpose, and (2) there is no constitutional or statutory limit on the exercise of that authority. *Pleasures II Adult Video, Inc. v. City of Sarasota*, 833 So.2d 185 (Fla. 2d DCA 2002).

The reliance of *Timoney v. City of Miami*, 990 So.2d 614 (Fla. 3d 2008) is without merit. The City of Miami is a municipality within the County of Miami-Dade. The preamble to the Miami Dade charter espouses the desire to “serve [the] present and future needs, and to endow our municipalities with the rights of self determination in their local affairs...” The Miami-Dade Home Rule Charter empowers its Board to “make investigations of county affairs...and for these

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<sup>2/</sup> Monroe County is governed by a Code.

<sup>3/</sup> *F.S. §166.021*.

purposes...subpoena witnesses ...and require the production of records.”<sup>4</sup>/ Similarly, the CRB’s reliance on *Dibb v. County of San Diego*, 884 P.2d 1003 (Cal. 1994) is without merit since the statutory and constitutional make up of San Diego is not akin to Monroe County and the City of Key West and whether there was a proper delegation of authority.

There is no provision in the Municipal Home Rule Powers Act to make investigations or subpoena witnesses in order to carry out the purpose of making investigations.

Although the CRB relies upon *Barry v. Garcia*, 573 So.2d 932 (Fla. 3d DCA 1991), as support for its subpoena power, in actuality, the Third District Court of Appeal, in limiting the right of a non-elective board from exercising subpoena power, stated at page 936:

Generally a municipality derives its power of subpoena in connection with its power to legislate, or when exercised, a quasi judicial power. When a **municipal charter** of special act grants the use of subpoena power and prescribes, if any, **its manner of delegation, the specific delegation authorized** is the only means available by the governing authorities to the exclusion of any general grant of power or authority.[emphasis added]

Nowhere can the CRB exhibit to this Court or in its exhibits that the CRB was delegated subpoena power from an elected official.

**2. A state statute There is no delegated authority for the CRB to have subpoena power:**

Even if the subpoena power of an independent board is lawful, the execution of this power is not unrestricted. In *Timoney v. City of Miami Civilian Investigation Panel*, 917 So.2d 885 (Fla. 3d 2005) the court’s refusal to enforce a subpoena for highly sensitive operation records was upheld.

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<sup>4</sup> / It was this power which was specifically delegated to its Office of Inspector General. *Sirgany International, Inc. v. Miami-Dade County*, 887 So.2d 381, n.1 (Fla. 3d DCA 2004).

So, too, in *Demings v. Orange County*, 34 F.L.W. D1085 (Fla. 3d DCA opinion filed May 29, 2009), the court refused to allow an independent review board subpoena a sworn police officer because to mandatory provisions of *F.S. §112* prevail as the investigation of sworn police officers.

In fact, the Fifth DCA panel stated:

We note that the Attorney General has reached a similar conclusion. In an informal opinion of the Attorney General of Florida, dated March 22, 2004, the city attorney for Key West asked whether the city could create a board with the authority to “receive, investigate and make recommendations regarding complaints of police officer misconduct independent of the internal affairs procedures established by the [police department] pursuant to section 112.533(1), Florida Statutes.” Beginning with the presumption that such ordinances and charters were valid, the Attorney General concluded that the statute provided the “exclusive means to investigate complaints against law enforcement officers” and the Legislature’s prescription of such procedure effectively prohibited investigations from being done in any other manner. He also concluded that there did “not appear to be any provision for a citizens complaint review board to utilize the investigative procedures contained in Part VI, Chapter 112” or “to operate as the receiving entity for complaints against law enforcement officers” under that statute. Subsequently, in Opinion of the Attorney General of Florida 2006-35 (2006), the Attorney General reached the same conclusion in a formal opinion, finding that the Miami-Dade Police Department was the “exclusive” agency responsible for receiving, investigating and determining complaints against its officers pursuant to section 112.533, and can therefore offer no insight on a county’s authority under current law.

We have also considered the County’s citation to *Timoney v. City of Miami Citizens Review Panel*, 990 So.2d 614 (Fla. 3d 2008), and find that case equally unhelpful. *Timoney*, dealt with a city police chief, a law enforcement officer expressly exempted from the chapter 112 investigation. See §112.531(1), Fla. Stat. (2008). Accordingly, from our reading of *Timoney*, it seems clear that the local board’s authority to investigate a complaint in light of section 112.533 was never raised as an issue in that case. In fact, section 112.533 is neither cited nor discussed in *Timoney*.

### **3. Miscellaneous:**

The 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.

**4. Conclusion:**

There is no legal or jurisdictional basis for this court to grant the relief the CRB requests.

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION TO DISMISS, furnished this 15th day of July, 2009, by U.S. Mail, postage prepaid, and by fax to:

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Respectfully submitted,

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DATED: July 15, 2009  
Ft. Lauderdale, Florida