PINELLAS COUNTY
OFFICE OF COUNTY ATTORNEY

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BOARD OF COUNTY COMMISSIONERS
JAMES L. BENNETT
COUNTY ATTORNEY

June 16, 2008

Bram D. E. Canter, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

Re: Pinellas County Sheriff's Office v. John Bradshaw
DOAH Case No.: 07-3719; PCSO #07-04

Dear Judge Canter:

Pursuant to Florida Statutes Section 120.57(1)(m), please find enclosed a copy of the signed Final Order rendered by the Pinellas County Sheriff's Civil Service Board in the above-referenced matter as well as copies of the Respondent's Exceptions to Hearing Officer's Recommended Order and the Petitioner's Response to Respondent's Exceptions to Hearing Officer's Recommended Order.

Sincerely yours,

Suzanne M. Mucklow
Senior Assistant County Attorney

SMM/vs
Enclosures
cc: Kenneth J. Afienko, Esq. (w/o exceptions)
Ben Welling, Esq. (w/o exceptions)
Members of the Sheriff's Civil Service Board (w/o exceptions)
Vicki M. Troesch, GCO, P.C.S.O. (w/o exceptions)

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PINELLAS COUNTY SHERIFF'S OFFICE
CIVIL SERVICE BOARD

PINELLAS COUNTY SHERIFF'S OFFICE,

Petitioner,

v.

DOAH CASE NO. 07-3719
PCSO Case #07-04

JOHN BRADSHAW,

Respondent.
_____/

FINAL ORDER

This matter came before a quorum of 4 of 5 members of the Pinellas County Sheriff's Civil Service Board (Board) for hearing on June 9, 2008 with the Board having reviewed: the Division of Administrative Hearings (DOAH) Administrative Law Judge's (ALJ's) Recommended Order; the complete record provided by the ALJ; a transcript of the January 31, 2008 evidentiary hearing before the ALJ; the Respondent's Written Exceptions with attachments; the Petitioner's Response to Respondent's Written Exceptions; and oral argument. In considering a motion to adopt the ALJ's Recommended Order, the Board finds:

IT IS ORDERED AND ADJUDGED, that:

1. Pursuant to Special Act, *Chs. 89-404 and 90-395, Laws of Fla.*, the Board is a quasi-judicial body authorized to hear all appeals of members of the Classified Service arising from personnel actions brought under the Sheriff's rules, procedures, or policies that result in dismissal, suspension for more than 1 working day without pay, demotion, or reduction in base pay. Copies of the Special Act and later amendment comprise Exhibit A to this Order.

2. The personnel action taken against the Respondent, Deputy Bradshaw, was a four-day suspension that was served by him on August 23, 24, 25, and 26, 2007. A copy of the charges and Sheriff's findings reflecting the action are attached hereto as Exhibit B.

3. The Board elected to have the hearing conducted by a DOAH ALJ in accord with Section 11(8) of the Special Act. The ALJ's Recommended Order supports the personnel action taken by the Sheriff in that the ALJ recommended that the Board's final order contain "a conclusion that (1) Deputy Bradshaw engaged in the prohibited conduct for which he was charged, and (2) the disciplinary action taken against him was consistent with action taken against other members of the Sheriff's Office." A copy of the ALJ's Recommended Order is attached hereto as Exhibit C.

4. The Board's Rules of Procedure promulgated in accord with the Board's authority under the Special Act state that, in addition to ruling upon any exceptions filed, the Board shall adopt, reject, or modify the ALJ's findings of fact, conclusions of law, and recommended penalty in rendering its final order. A copy of the Rules of Procedure is attached hereto as Exhibit D.

5. By a vote of 2-2, the Board was unable to reach a majority decision with regard to adopting, modifying, or rejecting any portion of the ALJ's Recommended Order.

6. The Board's Rules of Procedure do not address the situation of a tie vote.

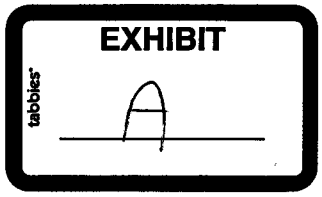
7. According to Section 8, Paragraph 1(h) of the Special Act pertaining to the Board's duties and authority, "[s]hould the Civil Service Board be unable to reach a majority decision on any appeal, the personnel action taken shall be sustained."

8. Therefore, since the Board is unable to reach a majority decision on this appeal, the four-day suspension imposed by the Sheriff's Office is hereby sustained in accord with the Special Act.

The parties are hereby notified of the right to appeal this Final Order to the Second District Court of Appeal by filing notice of intent to do so upon the Clerk of the Court and the Pinellas County Sheriff's Civil Service Board within thirty (30) days of the date of this Order in accord with Fla. Stat. § 120.68 and the Florida Rules of Appellate Procedure.

IT IS SO ORDERED, this 12TH day of June, 2008.

Neal A. White, Chair
Pinellas County Sheriff's Civil Service Board



EXHIBIT
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(4) The entire complex as defined must be owned, managed, controlled, and operated at all times by the fraternal organization holding the alcoholic beverage license authorized by this act.

Section 3. The alcoholic beverage license fee to be assessed shall be the same as the fee charged vendors operating places of business where consumption on the premises is permitted in counties having a population of over 100,000 according to the latest state or federal census.

Section 4. The license is authorized for use by the fraternal organization at the clubhouse for members and their guests and in conjunction with special events held at the complex which include, but are not limited to: weddings, commercial exhibits such as boat shows and automobile shows, and events sponsored by or held under the auspices of the chamber of commerce.

Section 5. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 6. This act shall take effect upon becoming a law.

Became a law without the Governor's approval June 28, 1989.

Filed in Office Secretary of State June 28, 1989.

CHAPTER 89-404

Senate Bill No. 704

An act relating to Pinellas County; creating a Civil Service System for officers and personnel of the Office of the Pinellas County Sheriff; specifying rights of officers and personnel; providing for the division of Civil Service into Classified and Unclassified Services and Executive Staff; providing procedures for appeal of disciplinary actions against personnel; providing for the creation and appointment of a Civil Service Board to hear appeals; providing for the selection, qualification, and authority of the Civil Service Board; providing for procedures with respect to appeals; providing for optional hearing procedures pursuant to chapter 120, F.S.; providing an exemption from chapter 120, F.S., the Administrative Procedure Act; providing for a Members' Advisory Council; providing for continuing status of certified personnel as appointed officers; providing for the adoption of rules for review of citizen complaints and other disciplinary actions; repealing chapter 84-514, Laws of Florida, as amended, relating to the personnel system of the Office of the Pinellas County Sheriff; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Intent.—It is the intent of this act to create a civil service system for members of the Classified Service, as defined herein, within the service of the

Sheriff of Pinellas County, for the purposes of ensuring fairness and consistency in discipline and dismissal. It is also the intent of this act to maintain the existing legal limitations on the right of collective bargaining and other rights under part II of chapter 447, Florida Statutes, and to not grant such rights to any deputy, member, or personnel of the Office of the Pinellas County Sheriff who, prior to the effective date of this act, did not possess such rights pursuant to law.

Section 2. Personnel of Pinellas County Sheriff; applicability of the act; authority of the Sheriff.—

(1) The provisions of this act shall apply to all certified, noncertified and executive persons within the Office of the Pinellas County Sheriff. The provisions of this act shall not apply to the Sheriff, special deputy sheriffs appointed pursuant to s. 30.09(4), Florida Statutes, contract personnel, legal advisors, chaplains, or individuals appointed as part-time deputy sheriffs, as defined by the Criminal Justice Standards and Training Commission, unless any such part-time deputy sheriff is also a full-time member in the Office of the Sheriff.

(2) For the purposes of this act, the term "personnel" shall refer to all persons working for the Pinellas County Sheriff's Office; provided that nothing stated herein shall be construed as changing the status of certified personnel from appointed officers to members covered by the provisions of chapter 447, Florida Statutes.

(3) The Sheriff shall have the authority to adopt such rules and regulations as are necessary for the implementation and administration of this act. However, nothing in this act shall be construed as affecting the budgetmaking powers of the Board of County Commissioners of Pinellas County.

Section 3. Classified and Unclassified Services; Executive Staff; status of members of the Classified Service, Unclassified Service and Executive Staff.—

(1) The Classified Service shall consist of full-time positions held by corrections officers, deputy sheriffs and noncertified personnel, who have attained permanent status as defined herein and who are serving in any position except those persons serving in the Unclassified Service or as members of the Sheriff's Executive Staff.

(2) The Unclassified Service shall consist of the following positions: all part-time positions, all full-time personnel who have not attained permanent status as defined herein, all volunteer or nonsalaried positions, school crossing guards, reserve deputies, and special deputies. Members of the Unclassified Service shall serve at the pleasure of the Sheriff and may be suspended, demoted, or terminated at any time without cause and without any right to appeal to the Civil Service Board.

(3) The Sheriff's Executive Staff shall consist of all certified personnel who have attained the rank of captain or above, the Public Information Coordinator, the Sheriff's executive secretary and all noncertified personnel whose salary is equal to or greater than the base salary for the rank of law enforcement captain.

(4) Members of the Sheriff's Executive Staff shall serve in those positions at the pleasure of the Sheriff. Except as provided herein, such personnel may be suspended, demoted, or dismissed at any time without cause and without any right of appeal to the Civil Service Board. However, persons serving as members of the

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Sheriff's Executive Staff who have, previous to their appointment to the Executive Staff, attained permanent status in the Classified Service may be returned to the highest rank or position such person achieved in the Classified Service without cause and without any right to appeal such return to Classified Service.

Section 4. Permanent status; effect of rehire; extension of probation; status upon election or appointment of new Sheriff.—

(1) After classified personnel of the Sheriff, to whom the provisions of this act apply, have served in such position for a period of 1 calendar year without break in service, such personnel shall have attained permanent status in the Office of the Sheriff, unless such personnel are placed on an extended probation.

(2) When personnel are terminated, resign, or are otherwise separated from service, and are rehired at a later date, they shall be required to complete 1 calendar year of service, without break in service, following such rehire before attaining permanent status in the Office of the Sheriff.

(3) Personnel in the Classified Service who are required to serve a probationary period attendant to a promotion shall retain permanent status in the Office of the Sheriff, but may be demoted to their prior rank during such probationary period for any reason and without the right of appeal as provided in this act.

(4) When, in the sole discretion of the Sheriff, an extension of a probationary period for newly hired or newly promoted personnel is warranted, such probationary period may be extended for a period up to 6 additional months. In the case of newly hired personnel, the affected personnel shall be required to satisfactorily complete the extended probationary period before attaining permanent status in the Office of the Pinellas County Sheriff.

Section 5. Effect of election or appointment of new Sheriff on status of personnel.—

(1) When a newly elected or appointed Sheriff assumes office, the new Sheriff shall continue the members of the Classified Service at their existing rank and/or salary level unless cause for demotion or dismissal, as provided herein, exists.

(2) When a newly elected or appointed Sheriff assumes office, persons then serving as members of the Sheriff's Executive Staff who, previous to their appointment to the Executive Staff, had attained permanent status in the Classified Service, shall not be suspended without pay for more than 5 working days or dismissed unless cause as provided herein exists. However, such personnel may be demoted to the highest rank achieved in the Classified Service without cause and without any right to appeal.

Section 6. Members of Classified Service; certain members of the Executive Staff; suspension, demotion, or dismissal only for cause.—

(1) Members of the Classified Service may only be suspended, for a period in excess of 1 working day, reduced in rank or base pay, or dismissed from service for cause. Members of the Executive Staff who have, previous to their appointment to the Executive Staff, achieved permanent status in the Classified Service may only be dismissed or suspended for a period in excess of 1 working day or demoted to a rank or rate of base pay less than the highest rank or base pay the member attained while in the classified service for cause. Prior to such action described above, the member shall be furnished with written notice of the proposed action

and an explanation of the reasons for the action, and offered an opportunity to respond to the reasons for the action. However, nothing stated herein shall be construed as changing the status of deputy sheriffs from appointed officers to employees covered by the provisions of chapter 447, Florida Statutes.

(2) In situations where the delay occasioned by furnishing personnel such written notice and opportunity to respond could result in damage or injury, personnel may be suspended or dismissed for cause immediately and provided such written notice and opportunity to respond within 24 hours.

(3) Written notice of disciplinary action to a department member shall be deemed to be effective upon hand delivery, or upon mailing to the member's last known address.

(4) Cause for suspension, dismissal, or demotion shall include, but not be limited to: negligence, inefficiency, or inadequate job performance; inability to perform assigned duties, incompetence, dishonesty, insubordination, violation of the provisions of law or the rules, regulations, and operating procedures of the Office of the Sheriff, conduct unbecoming a public servant, misconduct, or proof and/or admission of use of illegal drugs. Cause for suspension or dismissal shall also include the adjudication of guilt by a court of competent jurisdiction, a plea of guilty or of nolo contendere, or a verdict of guilty where adjudication of guilt is withheld and the accused is placed on probation, with respect to any felony or misdemeanor. The filing of felony or misdemeanor charges against Sheriff's Office personnel may also constitute cause for suspension. Subsequent dropping of charges shall result in automatic reinstatement, provided that independent departmental charges are not pending.

(5) The listing of causes for suspension, demotion, or dismissal in this section is not intended to be exclusive. The Sheriff may, by departmental rule, add to this listing of causes for suspension, dismissal, or demotion.

Section 7. Creation and qualifications of the Civil Service Board.—

(1) The Sheriff of Pinellas County is hereby authorized to create a Civil Service Board which shall be composed of five members which shall be determined as follows:

(a) Two members of the Civil Service Board shall be appointed by the Sheriff after being elected in an election among the members of the Classified Service. The Sheriff shall appoint the two persons receiving the highest number of votes in such election.

(b) Two members shall be appointed by the Sheriff.

(c) The fifth member shall be selected by the majority of the other four Board members within 15 days of their appointments. In the event that the selection process of the fifth member results in an impasse, within 15 days, the fifth member shall be appointed by the Chief Judge of the Sixth Judicial Circuit.

(d) The five members of the Board shall then select a sixth or alternate member who shall serve upon the inability of any other member to serve.

(e) The fifth member shall be chairperson of the Civil Service Board, unless the Board elects otherwise.

(f) Four members of the Civil Service Board shall constitute a quorum.

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(2) Membership qualifications and term:

(a) All members of the Civil Service Board shall be at least 21 years of age, of good moral character, of good reputation in the community, citizens of the United States, permanent residents of Florida, and permanent residents of Pinellas County for at least 2 years prior to the date of their appointment.

(b) No member of the Board may be:

1. A member of any national, state, or county committee of a political party;

2. A candidate for or incumbent of any elected public office;

3. A member of the Pinellas County Sheriff's Office, or the spouse, parent, grandparent, child, grandchild, brother, sister, aunt, uncle, niece, or nephew, by consanguinity or affinity of a member; or

4. Positioned as to have a conflict of interest in the terms of his or her related business, duties or responsibilities in connection with the Civil Service Board.

(c) The members of the Board shall serve a term of 1 year from the date of their election or appointment as the case may be.

(d) Members of the Board will receive no salary, but will be paid a stipend as determined by the Sheriff to offset expenses incurred in performing the duties of the Civil Service Board.

Section 8. Duties and authority of the Civil Service Board.—

(1) The Civil Service Board shall have the following authority and duties:

(a) To adopt and amend reasonable rules and regulations for its hearing procedures.

(b) To hear all appeals of the members of the Classified Service arising from personnel actions brought under the Sheriff's rules, procedures or policies, after a hearing by a hearing officer of the Office of Administrative Hearings pursuant to chapter 120 which result in dismissal, suspension for more than 5 working days without pay, demotion, or reduction in base pay.

(c) To hear appeals of members of the Executive Staff who have, previous to their appointment to the Executive Staff, achieved permanent status in the Classified Service, arising from personnel actions brought under the Sheriff's rules, procedures, or policies which result in dismissal or suspension for more than 1 working day or demotion to base pay less than the highest rank or base pay the member attained while in the classified service .

(d) Other than those specified above, the Civil Service Board shall not have authority to hear any other appeals.

(e) The authority of the Civil Service Board shall not include the establishment or deletion of the categories of conduct which constitute cause for suspension, demotion or dismissal. In hearing appeals, the Civil Service Board shall:

1. Determine whether the aggrieved member engaged in conduct prohibited by section 6 or by a departmental rule promulgated by the Sheriff;

2. Determine whether the action taken against the aggrieved member is consistent with action taken against other members; and

3. Make findings of fact and state a conclusion as specified in paragraph (h).

(f) The Civil Service Board may also provide assistance and advice to the Sheriff in matters concerning disciplinary actions and may take any other actions authorized by the Sheriff.

(g) The Civil Service Board, pursuant to its authority to hear appeals of members of the Classified Service, shall have the power to schedule hearings, administer oaths, take or allow the taking of depositions, issue subpoenas to compel the attendance of witnesses and the production of books, accounts, papers, records, documents, testimony, and other items to effect such other discovery as it deems fit and proper upon the written request of either party.

1. The chairperson of the Civil Service Board or his/her designee shall be authorized to sign all notices, subpoenas, and final orders, on behalf of the Board. In the case of disobedience or failure of any person to comply with a subpoena issued by the Board or any of its members, or upon the refusal of a witness to testify on any matter on which he or she may be lawfully interrogated, a Judge of the Circuit Court of Pinellas County, on application of the Civil Service Board, shall compel obedience by proceedings as for contempt.

2. The service of a subpoena shall be made in the manner provided by the Florida Rules of Civil Procedure. Each witness subpoenaed by the Civil Service Board shall receive for his attendance, from the party requesting the subpoena, fees and mileage in the amount as provided for witnesses in civil cases. Personnel of the Sheriff's Office appearing before the Civil Service Board while on duty shall not receive witness fees or reimbursements for mileage.

(h) Within 10 days of the conclusion of the appeals hearing, the Civil Service Board, by a majority vote, shall dispose of the appeal and shall make findings of fact and state a conclusion; such findings of fact and conclusion shall be separately stated and shall be in writing. Such conclusion shall either sustain, modify, or not sustain the action being appealed. Upon a finding that cause did not exist for a suspension, demotion, reduction in pay, or dismissal, the Civil Service Board shall reinstate the appellant and direct the Sheriff to pay the appellant for the period of any suspension, demotion, loss of pay, or dismissal. The Civil Service Board shall not have the authority to impose any penalty more severe than that which formed the basis of the appeal. Should the Civil Service Board be unable to reach a majority decision on any appeal, the personnel action taken shall be sustained.

(i) The decision of the Civil Service Board shall be final and binding on all parties concerned.

Section 9. Appeals procedure.—

(1) A member of the Classified Service who has been suspended without pay for more than 1 working day, demoted, reduced in base pay, or dismissed, and those members of the Executive Staff to whom rights of appeal are granted pursuant to section 3, may obtain a hearing before the Civil Service Board by filing a written Notice of Appeal with the Sheriff or his designee. Filing shall be effected by delivery in person to the Sheriff or his designee, or by U.S. mail, registered, return receipt requested. Such Notice of Appeal shall be filed within 5 calendar days of receipt of notice of the suspension, demotion, reduction in pay, or dismissal. Failure to file said written notice within the 5-day period prescribed herein shall constitute a voluntary waiver of all rights to an appeal under this act.

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(2) The Notice of Appeal shall contain:

(a) A statement that the person filing the Notice of Appeal is entitled to an appeal pursuant to the terms of this act as a present or former member of the Classified Service;

(b) A statement of the disciplinary action complained of and the basis for the appeal; and

(c) A request for relief.

(3) The appellant shall be limited in the scope of his or her appeal to the issues raised in the Notice of Appeal.

Section 10. Settlements and precedent.—In order to encourage resolutions of appeals prior to hearing, any settlement of an appeal acceptable to the appellant shall not establish a precedent against either the Sheriff, any member of the Classified Service or any member of the Executive Staff to whom the right of appeal is afforded by this act. Such settlement shall not conflict in any manner with the provisions of this act and shall not be used in any subsequent appeal hearing.

Section 11. Hearing procedure.—

(1) The Civil Service Board shall commence a hearing on an appeal within 30 days from the date upon which the Notice of Appeal was received by the Sheriff, or his designee, and shall proceed diligently to conclude such hearing in an expeditious fashion while affording to all parties a full and fair hearing. The Civil Service Board may grant a continuance of a hearing for good cause shown upon its own or a party's motion.

(2) The Civil Service Board shall establish appropriate rules and procedures for the conduct of all hearings pursuant to this act. All testimony of the parties and witnesses shall be made under oath or affirmation. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but shall not be sufficient in and of itself to support a finding unless it would be admissible over objections in civil actions.

(3) Each party shall be entitled to call witnesses on his or her own behalf, to compel the attendance of witnesses through the service of subpoenas, to cross-examine the witnesses, to represent himself or herself, or to be represented by any other representative of his or her choosing, and to be present at such hearing.

(4) Each party shall bear his or her own costs and fees incurred with respect to such hearings. No costs or fees shall be reimbursed by one party to the other regardless of the decision of the Civil Service Board under this act.

(5) Appeal hearings shall be open to the public in accordance with the provisions of chapter 286, Florida Statutes.

(6) The Civil Service Board, its members, the Sheriff, witnesses while giving truthful testimony, and all the representatives of the parties shall be immune from all civil liability arising from actions taken pursuant to the provisions of this act.

(7) A tape recording shall be made of each Civil Service Board hearing and minutes of the hearing shall be kept. Either party shall be entitled to engage the services of a certified court reporter to record such hearing. The party engaging services of the court reporter shall be solely responsible for payment for such services.

(8) The Civil Service Board may, upon stating its reasons, elect at any stage of the hearing procedure to contract with the Division of Administrative Hearings of the Department of Administration to have the hearing conducted pursuant to chapter 120, Florida Statutes, in which case the board shall limit its considerations to the findings and recommendations of the Department of Administration hearing officer.

Section 12. Exemption from chapter 120, Florida Statutes.—Unless the election is made to proceed under section 11(8), the actions of the Civil Service Board and the Sheriff taken pursuant to this act shall be exempt from the provisions of chapter 120, Florida Statutes.

Section 13. Members' Advisory Council.—There shall be a five-person Members' Advisory Council which shall serve in an advisory capacity to the Sheriff concerning personnel matters, policies, rules, and regulations affecting members of the Classified Service. The departmental representation of the Members' Advisory Council shall be determined by the Sheriff. All members of the Members' Advisory Council shall be permanent members of the department and members of the Classified Service. One member shall be elected from each of five areas to be determined by the Sheriff and shall be elected to serve by secret ballot of all members of the Classified Service within each respective area. Members of the Members' Advisory Council shall serve a 1-year term of office beginning July 1 of each year. The initial council shall serve from the date elected until July 1 of the following year.

Section 14. Certified personnel to maintain status as appointed officers.—Nothing herein shall be construed as altering the traditional status of certified personnel as appointed officers, who, as such, are excluded from coverage as employees under chapter 447, Florida Statutes.

Section 15. Sheriff to adopt rules and regulations for review of citizen complaints and other actions.—The sheriff shall, contemporaneous with the effective date of this act, by department rule or regulation, establish a procedure to review and resolve citizen complaints and disciplinary actions for which an appeal is not provided by this act.

Section 16. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 17. Chapter 84-514, Laws of Florida, as amended by chapter 87-424, Laws of Florida, is hereby repealed.

Section 18. This act shall take effect July 1, 1989, or upon becoming a law, whichever occurs later.

Became a law without the Governor's approval June 28, 1989.

Filed in Office Secretary of State June 28, 1989.

sons who were city officers or employees immediately prior to the effective date of this act.

6.04 Pending matters.—All rights, claims, actions, orders, and legal or administrative proceedings involving the city immediately prior to the effective date of this act shall continue, except as modified pursuant to the provisions of this act.

Section 2. City commissioners in office prior to the effective date of this act shall remain in office until the expiration of their terms.

Section 3. This act shall take effect July 1, 1990, or upon becoming a law, whichever occurs later.

Became a law without the Governor's approval June 22, 1990.

Filed in Office Secretary of State June 22, 1990.

CHAPTER 90-395

Senate Bill No. 1986

An act relating to the Pinellas County Sheriff's Civil Service System; amending ss. 5(2) and 8, ch. 89-404, Laws of Florida; decreasing the maximum period of suspension without pay for certain members of the sheriff's executive staff; providing for hearings on appeals; providing for contracting with the Division of Administrative Hearings for the conduct of appeal hearings; renumbering paragraphs and conforming cross-references; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 5 of chapter 89-404, Laws of Florida, is amended to read:

Section 5. Effect of election or appointment of new Sheriff on status of personnel.—

(2) When a newly elected or appointed Sheriff assumes office, persons then serving as members of the Sheriff's Executive Staff who, previous to their appointment to the Executive Staff, had attained permanent status in the Classified Service, shall not be suspended without pay for more than 1 ~~6~~ working day ~~days~~ or dismissed unless cause as provided herein exists. However, such personnel may be demoted to the highest rank achieved in the Classified Service without cause and without any right to appeal.

Section 2. Section 8 of chapter 89-404, Laws of Florida, is amended to read:

Section 8. Duties and authority of the Civil Service Board.—

(1) The Civil Service Board shall have the following authority and duties:

(a) To adopt and amend reasonable rules and regulations for its hearing procedures.

(b) To hear all appeals of the members of the Classified Service arising from personnel actions brought under the Sheriff's rules, procedures, or policies~~, after a hearing by a hearing officer of the Office of Administrative Hearings pursuant to chapter 120~~ which result in dismissal, suspension for more than 1 ~~5~~ working day ~~days~~ without pay, demotion, or reduction in base pay.

(c) To hear appeals of members of the Executive Staff who have, previous to their appointment to the Executive Staff, achieved permanent status in the Classified Service, arising from personnel actions brought under the Sheriff's rules, procedures, or policies which result in dismissal or suspension for more than 1 working day or demotion to base pay less than the highest rank or base pay the member attained while in the classified service.

(d) To contract with the Division of Administrative Hearings to have hearings conducted pursuant to chapter 120, Florida Statutes, as provided in section 11(8).

(2)~~(d)~~ Other than those appeals specified in subsection (1) ~~above~~, the Civil Service Board shall not have authority to hear ~~any other~~ appeals.

(3)~~(e)~~ The authority of the Civil Service Board shall not include the establishment or deletion of the categories of conduct which constitute cause for suspension, demotion, or dismissal. In hearing appeals, the Civil Service Board shall:

(a)~~1.~~ Determine whether the aggrieved member engaged in conduct prohibited by section 6 or by a departmental rule promulgated by the Sheriff;

(b)~~2.~~ Determine whether the action taken against the aggrieved member is consistent with action taken against other members; and

(c)~~3.~~ Make findings of fact and state a conclusion as specified in subsection (6) ~~paragraph (h)~~.

(4)~~(f)~~ The Civil Service Board may also provide assistance and advice to the Sheriff in matters concerning disciplinary actions and may take any other actions authorized by the Sheriff.

(5)~~(g)~~ The Civil Service Board, pursuant to its authority to hear appeals of members of the Classified Service, shall have the power to schedule hearings, administer oaths, take or allow the taking of depositions, issue subpoenas to compel the attendance of witnesses and the production of books, accounts, papers, records, documents, testimony, and other items to effect such other discovery as it deems fit and proper upon the written request of either party.

(a)~~1.~~ The chairperson of the Civil Service Board or his/her designee shall be authorized to sign all notices, subpoenas, and final orders, on behalf of the Board. In the case of disobedience or failure of any person to comply with a subpoena issued by the Board or any of its members, or upon the refusal of a witness to testify on any matter on which he or she may be lawfully interrogated, a Judge of the Circuit Court of Pinellas County, on application of the Civil Service Board, shall compel obedience by proceedings as for contempt.

(b)~~2.~~ The service of a subpoena shall be made in the manner provided by the Florida Rules of Civil Procedure. Each witness subpoenaed by the Civil Service Board shall receive for his attendance, from the party requesting the subpoena, fees and mileage in the amount as provided for witnesses in civil cases. Personnel of the Sheriff's Office appearing before the Civil Service Board while on duty shall not receive witness fees or reimbursements for mileage.

(6)~~(h)~~ Within 10 days of the conclusion of the appeals hearing, the Civil Service Board, by a majority vote, shall dispose of the appeal and shall make findings of fact and state a conclusion; such findings of fact and conclusion shall be separately stated and shall be in writing. Such conclusion shall either sustain, modify, or not sustain the action being appealed. Upon a finding that cause did not exist for a suspension, demotion, reduction in pay, or dismissal, the Civil Service Board shall reinstate the appellant and direct the Sheriff to pay the appellant for the period of any suspension, demotion, loss of pay, or dismissal. The Civil Service Board shall not have the authority to impose any penalty more severe than that which formed the basis of the appeal. Should the Civil Service Board be unable to reach a majority decision on any appeal, the personnel action taken shall be sustained.

(7)~~(i)~~ The decision of the Civil Service Board shall be final and binding on all parties concerned.

Section 3. This act shall take effect July 1, 1990, or upon becoming a law, whichever occurs later.

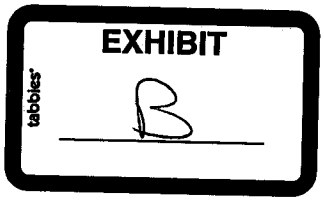
Became a law without the Governor's approval June 15, 1990.

Filed in Office Secretary of State June 15, 1990.

CHAPTER 90-396

Senate Bill No. 2068

An act relating to Pinellas County; amending ss. 5, 9, 10, and 12 of chapter 73-594, Laws of Florida, as amended; authorizing the Pinellas County Planning Council to coordinate issues and procedures relating to countywide growth management; providing for the adoption of amendments to certain plans, rules, standards, policies, objectives, and operating procedures by the planning council; providing that local future land use plans are not exempt from certain requirements of the countywide comprehensive plan; providing for amendments to the adopted countywide future land use plan by the planning council to be transmitted to the board of county commissioners; specifying certain actions the planning council may take in making recommendations to the Pinellas County Board of County Commissioners; requiring recommended orders pursuant to hearings under ch. 120, F.S., regarding proposed amendments to the countywide future land use plan to be considered by the board of county commissioners; providing for permissive rather than mandatory administrative hearings; providing clarifying language regarding compensation to the Department of Administration for hearing costs; specifying the scope of administrative review of proposed amendments to the countywide future land use plan; authorizing the review of certain decisions of the board of county commissioners pursuant to writ of certiorari; providing hearing and notice requirements for ordinances adopting or amending the countywide comprehensive plan or the countywide future land use plan; providing a technical amendment; repealing s. 11 of chapter 73-594, Laws of Florida, as amended, relating to advisory recommendations of the plan-



EXHIBIT
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PINELLAS COUNTY SHERIFF'S OFFICE
INTER-OFFICE MEMORANDUM

DATE: August 10, 2007

TO: DEPUTY JOHN BRADSHAW, #55578

FROM: SHERIFF JIM COATS

SUBJECT: CHARGES RE: AI-07-027

An investigation has been conducted by the Administrative Investigations Division, Inspections Bureau, of the Pinellas County Sheriff's Office. As a result of this investigation, the Administrative Review Board has determined the following violations.

On September 22, 2006, while on duty in Pinellas County, Florida, you violated the Pinellas County Sheriff's Civil Service Act Laws of Florida, 89-404 as amended by Laws of Florida 90-395, Section 6, Subsection 4, by violating the provisions of law or the rules, regulations and operating procedures of the Office of the Sheriff.

1. You violated Pinellas County Sheriff's Office General Order 3-1.3, Rules and Regulations 3.3, Knowledge of and Obedience to, Laws and Rules and Regulations and 3.4(d), Performance of Duty.

   Synopsis: While engaged in a high speed pursuit, you ran a red light at a minimum speed of 57 miles per hour and collided with a civilian vehicle which had already entered the intersection. Serious injuries were sustained by both drivers and a passenger in the civilian vehicle.

Disciplinary Points and Recommended Discipline Range:

You were found to be in violation of two Level Three violations resulting in a cumulative point total of 25. At this point level, the recommended discipline range is from one to five days suspension.

Disciplinary action shall be consistent with progressive discipline, for cause in accordance with the provisions of the Pinellas County Civil Service Act.

Major Daniel Simovich
Patrol Operations Bureau
FOR JIM COATS, SHERIFF

I have received a copy

(Date) 8/10/2007

(Time) 1530 Hrs

15578
SIGNATURE

JC:TRD:msm

8-10-07

PINELLAS COUNTY SHERIFF'S OFFICE
INTER-OFFICE MEMORANDUM
INSPECTIONS BUREAU

DATE: AUGUST 14, 2007

TO: DISTRIBUTION

FROM: CAPTAIN TERESA R. DIOQUINO TRD 8/14/07
Inspections Bureau

SUBJECT: AI-07-027 - SHERIFF'S FINDING

Per Sheriff Coats, Deputy John Bradshaw, #55578, will receive the following as a result of AI-07-027:

Four (4) days or 32 hours suspension to be served on: August 23, 24, 25 & 26, 2007.

TRD:JAG:msm

Distribution: Josephine Mattson, Office of the Sheriff
Chief Deputy Dennis Fowler
Major Kirk Brunner
Major Stephen Allen
Major Daniel Simovich
Director Dan Wiggins
Director Susan Dann
Director Beverly Pruitt
Director Julie Upman
Captain Calvin Dennie
Lieutenant Terry Sterling
Robert A Gualtieri, General Counsel
Marianne Pasha, Public Information Coordinator
Kathleen Corr, Grants Administrator
Purchasing-Uniform Supply
Human Resources
Payroll
Deputy John Bradshaw

NOTICE OF APPEAL
REQUEST FOR CIVIL SERVICE BOARD REVIEW

I request a Civil Service Board review of the following disciplinary action: See attached inter-office memorandum dated 08/10/2007, sustaining a complaint of misconduct in case #AI-07-027: four (4) day suspension, without pay, to be served on dates yet determined.

1. **I am entitled to an appeal pursuant to the terms of the Civil Service Act because**: I have been served with a notification of sustained complaint, which purports to impose a four (4) day suspension, without pay, for alleged misconduct in case #AI-07-027. Pursuant to General Order 10-3, I am entitled to an appeal in this personnel action brought under the Sheriff's Rules, Procedures or Policies, which has resulted in a suspension of more than one (1) working day without pay. The pertinent provisions of the Civil Service Act likewise entitle me to an appeal as a result of such action.

2. **Provide a brief statement of the disciplinary action being appealed**: See attached inter-office memorandum sustaining a complaint of misconduct in case #AI-07-027: four (4) day suspension, without pay, to be served on dates yet to be determined.

3. **Provide a complete statement for the basis for the appeal**: Pursuant to the Civil Service Act of the Pinellas County Sheriff's Office, the aggrieved member appeals to the Civil Service Board for a determination that the aggrieved member did not engage in conduct prohibited by any pertinent section of the Civil Service Act and a further determination that the aggrieved

07-818

member did not engage in any conduct prohibited by any Pinellas County Sheriff's Office Departmental Rule, General Order, or Policy as promulgated by the Sheriff. The aggrieved member also appeals to the Civil Service Board to make a determination that the action taken against the aggrieved member is inconsistent with action taken against other members for similar alleged conduct and submits that the action taken against him was disparate in nature, not progressive in nature as required by the Pinellas County Sheriff's Office General Orders, Regulations and Policies, and was generally unfair and excessive. In addition, the aggrieved member further appeals to the Civil Service Board for a determination that the Administrative Review Board considered evidence outside the scope of the investigation for which the member was not put on notice. The aggrieved member further appeals to the Civil Service Board for a determination that the alleged misconduct was justified. Furthermore, the aggrieved member appeals to the Civil Service Board that the investigation into the alleged misconduct violated Florida Statute 112.532(6), in that the discipline imposed was beyond 180 days from the time of the allegation of misconduct. Additionally, the investigation possibly violated other provisions of the Police Officer's Bill of Rights, the specifics of which will be noted after completion of discovery. Moreover, the aggrieved member appeals to the Civil Service Board for a determination that he did not violate the specific allegations as set forth in a Pinellas County Sheriff's Office inter-office memorandum, including but not limited to the following: Pinellas County Sheriff's Office Civil Service Act Laws of Florida, 89-404 as amended by laws of Florida 90-395, Section 6, and Subsection 4. More specifically, as set forth in the Pinellas County Sheriff's inter-office memorandum attached hereto:

You violated Pinellas County Sheriff's Office General Order 3-1.3, Rules and Regulations 3.3, Knowledge of and Obedience to Laws and Rules and Regulations and 3.4(d), Performance of Duties.

Synopsis: While engaged in a high speed pursuit, you ran a red light at a minimum speed of 57 miles per hour and collided with a civilian vehicle which had already entered the intersection. Serious injuries were sustained by both drivers and a passenger in the civilian vehicle.

4. **Specify what relief you request**: The aggrieved member seeks the relief set forth above and also the determinations set forth above by the Civil Service Board including, but not limited to findings that he did not engage in violations of the Civil Service Act or General Orders, Rules and Regulations of the Pinellas County Sheriff's Office, a determination that the aggrieved member did not engage in conduct prohibited by Section 6 or any pertinent portion of the Civil Service Act or of any Departmental Rule, General Order or Policy or Policies as promulgated by the Sheriff. The aggrieved member alternatively and further requests relief in the form of a determination by the Civil Service Board of findings of fact and conclusions determining that he did not engage in misconduct as alleged, and further that if said actions purported to constitute said misconduct occurred, that said actions were justified. Alternatively, the aggrieved member seeks relief in the form of a determination by the Civil Service Board that the action taken by the Pinellas County Sheriff's Office and Sheriff Jim Coats in case #AI-07-027 as set forth in a notification of sustained complaint, is inconsistent with action taken against other members, is excessive and disparate in nature and otherwise too severe. The aggrieved member alternatively

and further seeks relief in the form of a finding, conclusion or determination by the Civil Service Board that the action taken by the Pinellas County Sheriff's Office was in violation of Florida Statute 112.532(6) and possibly other provisions of the Police Officer's Bill of Rights. The aggrieved member alternatively and further seeks relief in the form of a finding, conclusion or determination by the Civil Service Board that action taken by the Pinellas County Sheriff's Office should be modified or not sustained and also seeks relief in the finding by the Civil Service Board that cause did not exist for the suspension and that the Sheriff reimburse the aggrieved member and make him whole for the period of any suspension, loss of pay, or other detrimental effects suffered as a result of the actions set forth in the inter-office memorandum.

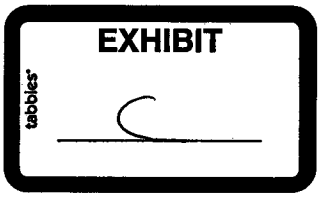
John Bradshaw, #55578
10750 Ulmerton Rd.
Largo, FL 33778
(727) 582-6200

LEO JRB /55578
Signature

08/10/2007 / 1530 HRS.
Date/Time Served

NOTICE OF APPEAL

Please note that John Bradshaw will be represented by the law firm of Kenneth J. Afienko, P.A. All communication or correspondence relating to this Civil Service Board Appeal should be directed to Kenneth J. Afienko, 560 1st Avenue North, St.Petersburg, FL 33701 (727) 894-5392, (727) 894-0797 Facsimile.



EXHIBIT
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SHERIFF'S OFFICE,	)	
Petitioner,	)	
vs.	)	Case No. 07-3719
JOHN BRADSHAW,	)	
Respondent.	)	

RECOMMENDED ORDER

The final hearing in this case was held on January 31, 2008, in Largo, Florida, before Administrative Law Judge Bram D. E. Canter of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Benjamin R. Welling, Esquire
Ford & Harrison LLP
101 East Kennedy Boulevard, Suite 900
Tampa, Florida 33602

For Respondent: Kenneth J. Afienko, Esquire
Kenneth J. Afienko, P.A.
560 First Avenue, North
St. Petersburg, Florida 33701

STATEMENT OF THE ISSUES

The issues to be determined in this case are whether Respondent, Deputy John Bradshaw, engaged in conduct prohibited by the rules promulgated by Petitioner, Pinellas County Sheriff's Office, and, if so, whether the disciplinary action

taken against Deputy Bradshaw was consistent with action taken against other members of the Sheriff's Office.

PRELIMINARY STATEMENT

On August 10, 2007, Deputy Bradshaw was charged with violating two regulations applicable to members of the Sheriff's Office when he was involved in a crash that occurred on September 22, 2006, involving his Sheriff's Officer cruiser and a "civilian" vehicle during the pursuit of a fleeing suspect. On the same date, the Sheriff's Office imposed disciplinary action against Deputy Bradshaw of four days suspension without pay, and informed him of his right to request an appeal to the Civil Service Board. Deputy Bradshaw timely requested an appeal, and the matter was referred to DOAH on August 17, 2007, to assign an Administrative Law Judge, conduct an evidentiary hearing, and make a recommendation to the Civil Service Board.

At the final hearing, the Sheriff's Office presented the testimony of Lt. Timothy Pelella, Sgt. Glen Luben, and Cpt. Wayne Morris. Petitioner's Exhibits 1 through 5 were admitted into evidence. Deputy Bradshaw testified on his own behalf and also presented the testimony of Sheriff James Coats, Cpt. Teresa Dioquino, Lt. John Tillia, Cpt. Dean Lachance, Deputy Linda Willett, Cpt. Nicholas Lazaris, Deputy Traci Longano, Sgt. Robert D'Andrea, Jr., Deputy Roscoe Dobson, Deputy Jeff Martin, and Sgt. Lawrence Palombo. Respondent's Exhibits 1 through 10

were admitted into evidence. Official recognition was taken of Chapters 89-404 and 90-395, Laws of Florida; and the Order Granting Respondent's Motion to Dismiss with Prejudice and transcript of the motion hearing in Pinellas Lodge No. 43, Fraternal Order of Police and John Bradshaw v. Pinellas County Sheriff's Office, Case No. 07-010513 CI-13, Sixth Jud. Cir. Ct. (January 16, 2008).

The one-volume Transcript of the final hearing was filed with DOAH. The parties filed proposed recommended orders that were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times relevant to this case, John Bradshaw was a deputy employed by the Pinellas County Sheriff's Office.

The Pursuit

2. On September 22, 2006, one or more deputies were "staking out" an area along Ulmerton Road in Largo where burglaries of vehicles had been reported. At about 1:30 a.m., a suspicious vehicle was observed in the area by Sgt. Lawrence Palombo. When the driver of the vehicle began to drive recklessly (traveling southbound in a northbound lane), Sgt. Palombo decided to make a traffic stop of the vehicle. He called other deputies for assistance before doing so. When Sgt. Palombo turned on his flashing lights to make the traffic stop,

the suspicious vehicle slowed, pulled to the right as if to stop, but then sped away. A pursuit of the vehicle was immediately initiated.

3. The testimony of the deputies involved in the pursuit differed as to where the pursuit began, but the exact location is not material in this case. The pursuit started on 49th Street somewhere between 110th Avenue and 126th Avenue and traveled south on 49th Street.

4. Sheriff's Office regulations limit the number of Sheriff's Office cruisers that may participate in a pursuit to three. The three cruisers involved in this pursuit were driven by Sgt. Palombo, Deputy Bradshaw and Deputy Jeff Martin.

5. The pursuit reached speeds of 85 or 90 mph. It passed through a number of intersections along 49th Street that had traffic lights. At some of these intersections, the traffic light was red for southbound traffic, but the deputies proceeded through the intersections on the red lights.

6. As the pursuit approached the intersection of 49th Street and 38th Avenue, the order in which the pursuing deputies were aligned behind the suspect vehicle was Sgt. Palombo in the lead, then Deputy Bradshaw, and Deputy Martin last. Deputy Bradshaw's cruiser was a 2005 Crown Victoria 4-door sedan.

7. All the cruisers had their lights flashing. The record shows that Sgt. Palombo had his siren on. The record does not

show whether the other two deputies in the pursuit were using their sirens, but it was not a disputed factual issue and it would be reasonable to infer that all three deputies were using their sirens.

8. The intersection at 38th Avenue has four southbound lanes, including a left turn only lane, two through only lanes, and a far right lane which can be used for through traffic or to turn right. Sgt. Palombo testified that, as the pursuit neared the intersection, he saw "vehicles . . . stopped at the intersection," and "we came up on cars that were at that intersection going in the same direction." These "civilian" vehicles must have been stopped in the two right lanes because its was undisputed that Sgt. Palombo was in the left turn lane and Deputy Bradshaw was in the lane next to Sgt. Palombo, the leftmost through lane.

9. The suspect vehicle proceeded through the intersection at 38th Avenue. Sgt. Palombo slowed to a stop in the left turn lane. He thinks he stopped his cruiser at the "stop bar" or "maybe in the crosswalk."

The Crash

10. Grace Umali, driving a 2002 Toyota 4-Runner was traveling westbound (coming from the deputies' left) through the intersection on a green light. Her three-year-old son was also in the vehicle.

11. Sgt. Palombo, stopped in the left turn lane, saw the Umali vehicle come from his left, pass in front of him and then collide with Deputy Bradshaw's cruiser. A subsequent crash scene investigation found no pre-crash skid marks, which indicates that neither driver braked hard before impact.

12. There was no dispute that the collision occurred in the leftmost, southbound through lane, only about one car length beyond the "stop bar" where vehicles must stop for a red light.

13. Following the initial impact, Deputy Bradshaw's vehicle continued south across the intersection and hit a traffic light pole at the southwest corner of the intersection. The cruiser caught fire as a result of the crash. The Umali vehicle also traveled south across the intersection after impact, rolled over, and came to rest upside down along the western curb of 49th Street, beyond Deputy Bradshaw's cruiser. Both vehicles were "totaled."

14. The crash resulted in Deputy Bradshaw suffering a broken leg and minor cuts and bruises. Ms. Umali and her son also suffered injuries, but the record does not identify their injuries.

15. Evidence was presented on the disputed factual issue of which vehicle struck the other. Deputy Bradshaw contends that the Umali vehicle struck him, somewhere near his left front wheel. Deputy Martin, who was 50 to 70 yards behind Deputy

Bradshaw when the crash occurred, said it appeared to him that the Umali vehicle struck Deputy Bradshaw. However, Deputy Linda Willett, who was a member of the Major Accident Investigation Team (MAIT) that responded to the Bradshaw crash, said the crash scene investigation, primarily the physical evidence of damage on each vehicle, made her conclude that Deputy Bradshaw struck the Umali vehicle. She could not recall seeing any damage to the front of the Umali vehicle. Captain Nicholas Lazaris, the leader of the MAIT Team, and Lt. Timothy Pellela, another MAIT Team member, also concluded that Deputy Bradshaw had struck the Umali vehicle.

16. The parties placed more importance on this factual dispute then it warranted because the difference between the two scenarios is a fraction of a second.[1] However, the more persuasive evidence is from the crash scene investigation -- indicating that Deputy Bradshaw struck the Umali vehicle -- because the vehicle damage evidence is more objective and reliable than human memory of split-second events during stressful circumstances.

The Speed of the Vehicles

17. The most important factual dispute in this case was how fast Deputy Bradshaw was going when the crash occurred. Deputy Bradshaw claims he slowed to about 35 mph. Sgt. Palombo estimated Deputy Bradshaw's speed was 40 mph. However, at the

hearing, Sgt. Palombo stated in response to a question about how far Deputy Bradshaw was behind him, "To be honest with you, you really don't want me to know the answer to that question." His clear meaning was that his attention needed to be elsewhere. This and other testimony by Sgt. Palombo shows his attention was directed forward, as would be expected. Therefore, Sgt. Palombo's estimate of Deputy Bradshaw's speed at the moment of the crash is not reliable.

18. Lt. Pelella was an alternate on the MAIT Team that was called to respond to the crash. Lt. Pelella was assigned both on-scene investigation and crash reconstruction duties. In crash reconstruction, a conservation of linear momentum formula is used, which takes into account factors such as the point of impact, the distance the vehicles traveled after impact, their weight, and drag, to arrive at an estimate of the speed of the vehicles at the moment of impact. Applying this methodology, Lt. Pelella estimated that Deputy Bradshaw was traveling at about 57 mph and Ms. Umali was traveling at about 42 mph when the collision occurred.

19. Deputy Bradshaw attempted to cast doubt on the credibility of Lt. Pelella's estimate of vehicle speeds by showing that the traffic crash report prepared by Deputy Willett the day after the crash included the same speeds for the vehicles, 57 mph and 42 mph, that Lt. Pelella came up with two

months later using the conservation of linear momentum formula. Deputy Willett testified that she did not come up with the vehicle speed information for her report; that it had to have been provided by another member of the MAIT Team. In response to a leading question from Petitioner's counsel, the MAIT team leader, Captain Nicholas Lazaris, agreed that the speeds indicated in Deputy Willet's report "were filled in to comport with Lieutenant Pelella's accident reconstruction." The implication is that Deputy Willett's report did not include the vehicle speeds when it was prepared and signed by her, but the vehicle speeds were put into the report later without changing the date of the report.

20. The record is left unclear about how the vehicle speeds came to be in Deputy Willett's report, but this curious situation did not rise to the level of proof of some conspiracy to falsify the report. It also did not cause Lt. Pelella's conclusions about the vehicles speeds to be unreliable.

21. Sgt. Glen Luben was another member of the MAIT Team that responded to the Bradshaw crash. He obtained the Power Train Control Module from Deputy Bradshaw's vehicle to extract some of the data that is automatically recorded when there is a loss of power. Sgt. Luben testified that the recorded information indicated that Deputy Bradshaw's vehicle was going 70.13 mph when his cruiser's engine stopped. He said this

figure was consistent with the crash reconstruction done by Lt. Pelella which estimated Deputy Bradshaw's speed to be 57 mph, because the conservation of linear momentum formula produces a "minimum speed." Sgt. Luben believes 70.13 mph to be the more likely actual speed that Deputy Bradshaw was traveling at the moment of impact.

22. Sgt. Palombo thought Ms. Umali was exceeding the speed limit, which is 35 mph. Lt. Pelella's estimate that Ms. Umali was going 42 mph is consistent with Sgt. Palombo's testimony. Deputy Martin testified that Ms. Umali was going "[p]robably 55 or 60, just from what little I saw of it." This testimony by Deputy Martin, as well as his testimony that the Umali vehicle struck the cruiser and that Deputy Bradshaw used due care, was not persuasive. It appeared to be based on Deputy Martin's desire to support Deputy Bradshaw rather than an impartial account of his actual observations.

23. The crash scene photos and other data do not support Deputy Bradshaw's claim that he was going only 35 mph at the time of the crash. The more persuasive evidence puts his speed in the range established by Lt. Pelella's crash reconstruction and Sgt. Luben's analysis of the Power Train Module from Deputy Bradshaw's cruiser, between 57 and 70 mph.

24. Although Deputy Bradshaw denied that he was going 57 mph, he agreed that if he had been going that fast, he would not have been exercising due care.

Whether Deputy Bradshaw was Wearing His Seatbelt

25. At the final hearing Respondent presented some evidence to show that Deputy Bradshaw was not wearing his seatbelt at the time of the crash. Deputy Bradshaw claims he was wearing his seat belt, but he objected to Petitioner's introduction of seat belt evidence because Deputy Bradshaw was not informed in the charging document that his failure to wear his set belt was an element of the charges against him. The August 10, 2006, inter-office memorandum that officially informed Deputy Bradshaw of the charges against him stated:

> Synopsis: While engaged in a high speed pursuit, you ran a red light at a minimum speed of 57 miles per hour and collided with a civilian vehicle which had already entered the intersection. Serious injuries were sustained by both drivers and a passenger in the civilian vehicle.

Similarly, the parties' Joint Pre-Hearing Stipulation stated Petitioner's position as "Respondent was traveling at a speed which was faster than that at which he could safely clear the intersection." Therefore, the Administrative Law Judge sustained Deputy Bradshaw's objection and ruled that seat belt evidence was inadmissible.

Ms. Umali's Impairment

26. In the course of the post-crash assistance provided to Ms. Umali and her passenger, it was determined that she was driving under the influence of alcohol. She was charged and convicted for misdemeanor DUI.

27. The location of the initial collision means that Ms. Umali had crossed about 60 percent of the intersection before the collision, but Deputy Bradshaw had just entered the intersection. Clearly, Ms. Umali entered the intersection well before Deputy Bradshaw. The record evidence establishes that when Ms. Umali got to the intersection, Sgt. Palombo's cruiser was stopped at the intersection with its siren on and lights flashing. Ms. Umali would have seen Sgt. Palombo's cruiser.

28. Respondent's Exhibit 7 contains a deputy's written notes from his interview with Ms. Umali just after the accident. Neither Ms. Umali nor the deputy who interviewed her were called as witnesses. The exhibit was admitted into evidence over a hearsay objection to show what was considered by the Administrative Review Board in determining the discipline to recommend. The exhibit was not admitted for the truth or accuracy of the statements contained in the exhibit.[2] However, the hearsay notation that Ms. Umali told the interviewing deputy that she saw the "cops" and their flashing lights supplements

the non-hearsay evidence that she saw (at least) Sgt. Palombo's cruiser.

29. Whether caused by her impairment or another reason, Ms. Umali did not yield the right-of-way to an emergency vehicle as the law requires.

30. It is Deputy Bradshaw's position that Ms. Umali's impairment and failure to yield are important facts in determining whether he used due care under the circumstances. An unstated implication of his argument is that it was reasonable for him to expect civilian vehicles approaching or entering the intersection to yield and, consequently, reasonable for him to disregard the possibility of a non-yielding vehicle.

31. This argument is inconsistent with Deputy Bradshaw's testimony that he did not notice whether the light at 38th Avenue was red or green, but the color of the light did not matter to him because he always slows at an intersection to make sure it is safe to pass through. In other words, he drives defensively even when he has the right of way.

32. Curiously, no one asked Sgt. Palombo why he stopped in the left turn lane at 38th Avenue. He said he intended to continue his pursuit of the suspect vehicle and that, as soon as the Umali vehicle passed by him, he proceeded through the intersection and continued the pursuit. It is reasonable to infer from the record evidence that Sgt. Palombo came to a stop

or near-stop because he saw the Umali vehicle approaching. If he did not see the Umali vehicle approaching, he would have merely slowed down, as he did at the other intersections through which the pursuit had passed. Deputy Bradshaw should have been alerted by Sgt. Palombo's action in stopping at the intersection that there might be oncoming traffic.

33. Petitioner showed by a preponderance of the evidence that Deputy Bradshaw failed to drive with due regard for the safety of all persons under the circumstances that existed at the time of the crash.

The Disciplinary Process

34. Deputy Bradshaw claims that his case was handled differently than all other disciplinary cases arising from a crash during a pursuit. The usual procedure followed when there has been a pursuit that resulted in a crash is that the matter is reviewed by the Pursuit Review Board and also the Crash Review Board. Neither of these boards reviewed the Bradshaw crash. Instead, the crash was investigated by the Administrative Investigations Division within the Sheriff's Office and then presented to the Administrative Review Board to determine whether discipline against Deputy Bradshaw was warranted and to make a recommendation for disciplinary action to Sheriff James Coats.

35. Deputy Bradshaw believes his case was handled differently because of the concern of Petitioner's general counsel about civil liability arising from the collision. This proposed explanation seems illogical, because an employer concerned with liability would be expected to assert that its employee did nothing wrong, not the opposite. A plaintiff would be encouraged, not discouraged, by Petitioner's action against Deputy Bradshaw in this case.

36. Petitioner acknowledges that the procedure it followed in the Bradshaw matter was atypical, but that it was justified by the atypical facts involved. Captain Wayne Morris was chairman of the Pursuit Review Board which meets monthly to review pursuits from the previous month. He said the Pursuit Review Board has an option of referring a matter for an internal investigation when there is an appearance of possible misconduct by a deputy. He said the Bradshaw crash was one of several pursuit cases that was scheduled to come before the board, but he asked or suggested that it should be investigated by the Administrative Investigations Division based on "the seriousness of the crash." He said that he could not remember a crash that involved vehicles that were "totaled" or injuries to a "third party."

37. Captain Morris said that even though General Order 15-2 of the Sheriff's Office states that all pursuits will be

reviewed by the Pursuit Review Board, that is just a guideline and does not always have to be followed.

38. Captain Dean Lachance, chairman of the Crash Review Board, said that his board was not the appropriate body to investigate the Bradshaw matter "because of the level of discipline that we can levy," and that if this matter had come to the board, it would likely have been referred to the Administrative Investigations Division.

39. Sheriff Coats provided similar testimony that this was an unusual case in the time that he has been Sheriff and it warranted a different review.

40. An Administrative Review Board considered the information compiled by the Administrative Investigations Division and recommended that Deputy Bradshaw be suspended for four days. Sheriff Coats accepted the recommendation and notified Deputy Bradshaw of the disciplinary action on August 10, 2007. The suspension was served by Deputy Bradshaw on August 23 through 26, 2007.

41. Deputy Bradshaw made much of the deviation from usual procedures that occurred in this case, suggesting that it shows some kind of conspiracy to determine wrongdoing and to impose harsh discipline. However, the evidence shows that there was a reasonable perception, shared by several high-ranking officials in the Sheriff's Office, that the matter warranted special

attention because (1) it involved unusually extensive property damage and personal injuries to a deputy and to civilians and (2) because Deputy Bradshaw might have been at fault.

42. It is natural for a crash under these circumstances to create heightened concern or interest in the Sheriff's Office. Deputy Bradshaw's claim that the pending lawsuit by Umali against the Sheriff's Office caused his discipline to be more severe than was justified is not supported by the evidence.

Whether the Disciplinary Action was Consistent

43. Deputy Bradshaw showed that the Crash Review Board has never recommended more than a reprimand, even in cases where a deputy was involved in two preventable crashes. Deputy Bradshaw argues that this proves his own discipline was too severe. However, the evidence presented by Deputy Bradshaw included no factual details from the other disciplinary cases that could establish that they involved similar circumstances or otherwise would warrant similar punishment. The record evidence shows that there were no previous incidents that could be described as "similar."

44. Under the circumstances, Deputy Bradshaw should have decelerated to a very slow speed or even to a stop to make certain no vehicle was approaching from the east. The discipline Deputy Bradshaw received was commensurate with the degree of his deviation from his duty to drive with due regard

for the safety of all persons. It was neither inconsistent with prior disciplinary action taken by the Sheriff's Office against other members nor unreasonably harsh for the offense that was proven.

Facts Related to Section 112.532(6), Florida Statutes

45. As discussed more fully in the Conclusions of Law, Section 112.532(6), Florida Statutes (2006), states that disciplinary action cannot be taken against any law enforcement officer in the state for any allegation of misconduct if the investigation of the allegation is not completed within 180 days after the date the agency receives notice of the allegation by a person authorized by the agency to initiate an investigation. Deputy Bradshaw contends that the investigation of the charges against him arising from the crash on September 22, 2006, was not completed within 180 days and, therefore, no disciplinary action can be taken against him.

46. Captain Teresa Dioquino was in charge of the Administrative Investigations Division of the Sheriff's Office when the subject crash occurred. She testified that Deputy Bradshaw was informed that her division was investigating the crash on May 21, 2007, through a "Notice of Complaint." She said that was also the date that her division "formally" began its investigation. If May 21, 2007, was the operative beginning date, the Sheriff's Office met the 180-day requirement.

47. However, the operative beginning date to calculate the 180-day requirement, as stated in the statute, is "the date the agency received notice of the alleged misconduct." It is not the date that an investigation is formally initiated. Deputy Bradshaw's speed going through the intersection was the fundamental factual basis for his alleged misconduct in this case. Therefore, the date when the Sheriff's office received notice of Deputy Bradshaw's speed would be the operative beginning date to calculate compliance with the 180-day requirement.

48. Petitioner argues that it did not start its investigation of Deputy Bradshaw before May 21, 2007, because it was waiting for the results of Sgt. Luben's analysis of the Power Train Control Module from Deputy Bradshaw's cruiser, which was completed in May 2007. Petitioner essentially argues that the completion of Sgt. Luben's analysis was a necessary prerequisite for the Sheriff's Office to be on notice of the "allegation of misconduct" regarding Deputy Bradshaw.

49. However, Sgt. Luben testified that he did not discover until January 2007, that the Power Train Control Module even existed in the 2005 Crown Victoria. In other words, when the Sheriff's Office was informed on December 13, 2006, that Deputy Bradshaw was traveling at 57 mph, based on Lt. Pelella's crash reconstruction report, it had no reason to think Sgt. Luben was

going to come up with another estimate of Deputy Bradshaw's speed from his analysis of the Power Train Control Module. Once Lt. Pelella's 57 mph estimate was reported, Sgt. Luben's subsequent analysis became just a part of the investigation of the alleged misconduct that had to be completed within 180 days. Furthermore, the fact that the Bradshaw crash never went to the Pursuit Review Board or the Crash Review Board during the period from December 2006 to May 2007 indicates a continuing assumption that the Bradshaw crash warranted an investigation of possible misconduct.

50. Using December 13, 2006, as the date the Sheriff's Office received notice of the alleged misconduct of Deputy Bradshaw, the investigation was not completed within 180 days as required by Section 112.532(6), Florida Statutes (2006). Nevertheless, as discussed in the Conclusions of Law that follow, the exclusive remedy for a violation of the 180-day requirement is an injunction action in circuit court. The failure of the Sheriff's office to comply with the 180-day requirement cannot be raised as a defense in this administrative action.[3]

CONCLUSIONS OF LAW

51. DOAH has jurisdiction of this case pursuant to Section 120.57(1), Florida Statutes (2007), and Section 8(1)(d), of Chapter 90-393, Laws of Florida. The latter provision

authorizes the Civil Service Board of Pinellas County to contract with DOAH to have hearings conducted pursuant to Chapter 120, Florida Statutes.

52. Petitioner has the burden of proof in this case and the standard of proof is preponderance of the evidence. Dalem v. Department of Corrections, 720 So. 2d 575 (Fla 4th DCA 1998).

Whether Disciplinary Action is Barred by Section 112.532(6), Florida Statutes

53. Part VI of Chapter 112, Florida Statutes, grants rights to any law enforcement officer in the state related to the investigation of the officer's possible misconduct. Section 112.532(6), Florida Statutes (2006), states in relevant part:

> (a) Except as provided in this subsection, no disciplinary action, demotion, or dismissal shall be undertaken by an agency against a law enforcement officer or correctional officer for any act, omission, or other allegation of misconduct if the investigation of such allegation is not completed within 180 days after the date the agency receives notice of the allegation by a person authorized by the agency to initiate an investigation of the misconduct. In the event that the agency determines that disciplinary action is appropriate, it shall complete its investigation and give notice in writing to the law enforcement officer or correctional officer of its intent to proceed with disciplinary action, along with a proposal of the action sought. Such notice to the officer shall be provided within 180 days after the date the agency received notice of the alleged misconduct.

54. Section 112.534, Florida Statutes (2006), provides that a law enforcement officer "may apply directly to the circuit court . . . for an injunction to restrain or enjoin such violation of the provisions of this part and to compel the performance of the duties imposed by this part." Sometime after Deputy Bradshaw served his suspension, he filed an injunction action in the circuit court for Pinellas County pursuant to this statute, arguing that the failure of the Sheriff's Office to complete its investigation within 180 days barred any disciplinary action against him.

55. The circuit court dismissed Deputy Bradshaw's injunction action, stating that it lacked authority to grant the relief requested by Deputy Bradshaw, "to rescind punishment that he has already served."

56. Deputy Bradshaw argues that the order of the circuit court does not affect his ability to raise the 180-day issue in this administrative proceeding and that it bars any disciplinary action against him. However, the exclusive remedy for noncompliance with Section 112.532, Florida Statutes, is an action in the circuit court for injunctive relief. City of Miami v. Cosgrove, 516 So. 2d 1125 (Fla. 3d DCA 1987). In Migliore v. City of Lauderhill, 415 So. 2d 62, 65 (Fla. 4th DCA 1982), the court stated:

> This section operates only to immediately restrain violation of the rights of police officers by compelling performance of the duties imposed by Sections 112.531 to 112.533. Thus, where an officer under investigation is being interrogated without benefit of counsel, the agency may be restrained from violating his right to counsel; if an officer is dismissed without notice, the agency can be compelled to provide the proper notice; and, if an officer is refused review by the complaint review board, under appropriate circumstances, the agency can be compelled to grant such review. [emphasis supplied]

The court could have added: if an officer is not notified of the charges against him within 180 days from the agency's receipt of notice of the allegation of misconduct, the agency can be barred from attempting to punish the officer. However, noncompliance with the duties imposed by Section 112.532, Florida Statutes (2006), is exclusively enforced by injunction ordered by a circuit court.

Review Pursuant to the Chapter 90-393, Laws of Florida

57. Pursuant to Section 8(3), of Chapter 90-393, Laws of Florida, the Civil Service Board is to hear appeals arising from personnel actions, and to:

> (a) Determine whether the aggrieved member engaged in conduct prohibited by . . . a departmental rule promulgated by the Sheriff; and
>
> (b) Determine whether the action taken against the aggrieved member is consistent with action taken against other members; and

> (c) Make findings of fact and state a conclusion as specified in subsection (6).

Subsection 6, referred to above, states:

> Within 10 days of the conclusion of the appeals hearing, the Civil Service Board, by a majority vote shall dispose of the appeal and shall make findings of fact and state a conclusion; such findings of fact and conclusion shall be separately stated and shall be in writing. Such conclusion shall either sustain, modify, or not sustain the action being appealed. Upon a finding that cause did not exist for a suspension, demotion, reduction in pay, or dismissal, the Civil Service Board shall reinstate the appellant and direct the Sheriff to pay the appellant for the period of any suspension, demotion, loss of pay, or dismissal. The Civil Service Board shall not have the authority to impose any penalty more severe than that which formed the basis of the appeal. Should the Civil Service Board be unable to reach a majority decision on any appeal, the personnel action taken shall be sustained.

58. Petitioner's General Order 3-1 contains the standards of conduct which must be followed by all employees of the Pinellas County Sheriff's Office.[4] It creates five levels of violations, Level Five being the most egregious. Deputy Bradshaw was formally charged with two Level Three violations, designated 3.3 and 3.4(d). These provisions state:

> 3.3. Knowledge of, and Obedience to, Laws and Rules and Regulations - Every deputy is required to establish and maintain a working knowledge of all laws and ordinances in the county. All members shall observe and obey all General Orders, Standard Operating

> Procedures and Rules and Regulations issued by the Sheriff's Office. In the event of improper action or breach of discipline, it will be assumed the member was familiar with the applicable law, policy, or procedure.
>
> 3.4. Performance of Duty - All personnel shall take appropriate action to preserve the peace and perform their duties as required or directed by law, agency rules, policies and procedures, or other lawful orders of a supervisor.
>
> * * *
>
> d. All members will be efficient and effective in their assigned duties, performing them in a competent, proficient, and capable manner.

59. General Order 15-2 establishes guidelines regarding the operation of Sheriff's Office during a pursuit, including the following guidelines in Section 15-2.1(D):

> In accordance with Florida State Statute 316.072(5), deputies operating in the emergency operation/response mode may:
>
> * * *
>
> 2. Proceed past a red stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
>
> 3. Exceed the maximum speed limits so long as the driver does not endanger life or property;
>
> * * *
>
> 5. The foregoing provisions shall not relieve the driver from the duty to **DRIVE WITH DUE REGARD FOR THE SAFETY OF ALL PERSONS**, nor shall such provisions protect the driver from the consequences of his or

her reckless disregard for the safety of others. [emphasis in original]

60. By a preponderance of the evidence, Petitioner proved that Deputy Bradshaw violated Section 3.3 (Knowledge of, and Obedience to, Laws and Rules and Regulations) because Deputy Bradshaw admitted knowledge of the regulations applicable to pursuits, including the requirement to drive with due regard for the safety of all persons, but failed to "obey" this requirement on September 22, 2006.

61. By a preponderance of the evidence, Petitioner proved that that Deputy Bradshaw violated Section 3.4 (Performance of Duty) for failing to perform his duty to exercise due regard for the safety of all persons.

62. Failing to obey and failing to perform, in the context of the requirement to drive with due regard for the safety of all persons, are two ways of stating the same offense. There is essentially one act of wrongdoing by Deputy Bradshaw.

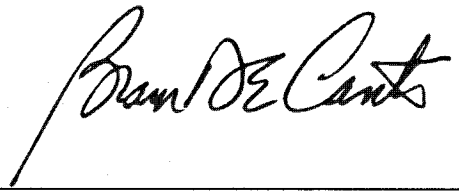
63. By a preponderance of the evidence, Petitioner proved that the disciplinary action taken against Deputy Bradshaw was reasonable and consistent with the disciplinary action taken against other members of the Sheriff's Office.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law set forth above, it is

RECOMMENDED that the Civil Service Board issue an Order that makes findings of fact that are consistent with those set forth in this Recommended Order, and contains a conclusion that (1) Deputy Bradshaw engaged in the prohibited conduct for which he was charged, and (2) the disciplinary action taken against him was consistent with action taken against other members of the Sheriff's Office.

DONE AND ENTERED this 18th day of April, 2008, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
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Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of April, 2008.

ENDNOTES

[1]/ Using simple arithmetic, it can be deduced that, if the Umali vehicle were traveling 42 mph (as found by the more persuasive evidence), it would have traveled about 15 feet in a quarter of a second.

[2]/ Respondent's Exhibits 1 and Petitioner's Exhibit 5 also contain hearsay statements which cannot be used to support a finding of fact. Although hearsay can be used to supplement otherwise admissible evidence, "supplement" in this context does not mean that hearsay can be used to establish material facts for which there is no other evidence.

[3]/ Deputy Bradshaw asserts that the Sheriff's Office told the circuit court that the 180-day requirement could be raised as an issue in the administrative proceeding, but the Sheriff's Office merely stated that the administrative proceeding was the "proper place" for the "relief" sought by Deputy Bradshaw. That is not the same thing as asserting that the administrative proceeding is the proper place to raise the 180-day issue. Furthermore, the Sheriff's Office cannot, through its statements, create subject matter jurisdiction.

[4]/ The version of General Order 3-1 admitted into evidence indicates an effective date of October 13, 2007, after the incident involved in this case, but Petitioner did not object to its admission on that basis.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

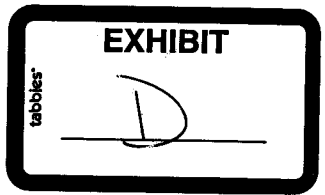
EXHIBIT
tabbies

PINELLAS COUNTY SHERIFF'S CIVIL SERVICE BOARD
RULES OF PROCEDURE

1. PURPOSE:

In accordance with the authority given to this Board by its enabling act, and in accordance with this Board's desire to conduct its hearing procedures in a fair and impartial manner, the following rules of procedure are hereby adopted. These rules shall be binding upon the Board in its hearings and shall only be subject to change by the affirmative vote of three or more members. The Board may adopt further "guidelines" as it deems necessary to further assist the parties in preparing for the conduct of these proceedings, however, such guidelines shall not have the force or effect of these rules. The adoption of these rules supersedes all Board Rules adopted previously.

2. AVAILABILITY OF HEARING:

Members of the classified service, unless otherwise exempted by the enabling act, who are the recipients of Personnel actions resulting in dismissal, suspension for more than one (1) working day without pay, demotion, or reduction in pay, shall be entitled to a hearing before a judge of the Florida Department of Administrative Hearings. Additionally members of the executive staff who have, previous to their appointment to the executive staff, achieved permanent status in the classified service, may appeal Personnel actions resulting in their dismissal or suspension for more than one (1) working day in the same manner.

3. MEMBERS REQUEST FOR HEARING:

A. Members entitled to a hearing shall, as a condition precedent to being granted a hearing, file a written Notice of Appeal. Such Notice of Appeal must be

received by the Sheriff's Office Personnel Division within five (5) calendar days of receipt of written notice of the suspension, demotion, reduction in pay, or dismissal to which the member is being subjected. Notice shall be deemed effective upon actual receipt. Failure to provide such written notice within the five (5) day period shall constitute a voluntary waiver by the member of all rights to appeal.

B. The member's Notice of appeal shall contain, as a minimum, the following items:

(1) a statement that the person filing the Notice of Appeal is entitled to an appeal pursuant to the terms of the Civil Service Act, as a present or former member of the classified service;

(2) a brief statement of the disciplinary action which is being appealed and the basis for the appeal; and

(3) a specific request for relief.

C. The appealing member shall be limited in the scope of his or her appeal to the issues which are raised in the Notice of Appeal.

4. <u>NOTICE TO MEMBER, BOARD AND INTERESTED PARTIES</u>:

Within five (5) calendar days of receipt of the member's Notice of Appeal, the Sheriff's Office Personnel Division shall transmit to the Board's legal counsel the entire appeal package. The Board's legal counsel shall then transmit the appeal package to the Department of Administrative Hearing office in Tallahassee which will schedule a hearing as expeditiously as possible and transmit back such information to the Board's legal counsel as may be necessary. This information shall be furnished by U. S. mail by the Board's legal counsel to all interested parties forthwith.

5. HEARINGS:

All hearings and proceedings related thereto shall be conducted according to the rules followed by the Department of Administrative Hearings and the rules provided herein.

6. APPEALING PARTY FAILS TO APPEAR:

Where a proceeding is commenced by a party pursuant to Special Act and said party, after filing their initial appeal, fails to appear for any scheduled proceedings or fails to contest a motion to dismiss submitted by the Sheriff to the presiding Administrative Law Judge, such party shall be deemed to have waived their appeal, and accepted the decision of the Sheriff as final. Further, said party agrees that the Administrative Law Judge is authorized by this Rule, to dismiss said appeal and submit a Recommended Order to that effect.

7. REVIEW BY BOARD:

A. Written Exceptions:

(1) Upon receipt by the Board of a recommended order from the Administrative Law Judge (ALJ), the same shall be provided by the Board's legal counsel to all interested parties. The party aggrieved by the recommended order shall have fifteen (15) days from receipt to file written exceptions to the recommended order with the Board and other parties. Said written exceptions shall not exceed fifteen (15) typed, double-spaced pages, excluding any attachments.

(2) Parties opposed to the filed written exceptions shall have fifteen (15) days from receipt of the written exceptions to file a response to

the exceptions with the Board and other parties. Responses to the written exceptions shall not exceed fifteen (15) typed, double-spaced pages, not including attachments. The Board shall then schedule a hearing on the recommended order at the next available meeting date for the Board, which, in any event, shall not be later than thirty (30) days from its receipt of the written exceptions and any responses.

(3) Each exception shall specify with particularity the finding of fact, conclusion of law, penalty, or recommendation(s) which is objectionable and the reasons therefor. The exceptions themselves shall state with specificity if the finding of fact excepted to is not supported by competent substantial evidence, or that the proceedings did not comply with the essential requirements of law, or that the conclusion of law excepted to departs from the essential requirements of law.

(4) Facts upon which exceptions to findings of fact or conclusions of law are based, which are not set forth in the recommended order, shall be provided by the party filing the exceptions. If either party so elects, a written transcript shall be prepared and served on the other party at the electing party's cost. The transcript shall be filed within thirty (30) days of the date of the recommended order, unless an extension is granted. If the Department of Administrative Hearings requires a transcript of the proceedings, the cost of the

preparation of such transcript shall be borne equally by the parties to the proceeding. In the event either party orders a transcript of a proceeding, then that party shall bear the cost of the original transcript, subject to the non-ordering party paying the costs of its copy. A copy of the ALJ hearing transcript shall be provided in either hard copy or electronic form by the County Attorney's Office to the Board members in their entirety for review prior to the scheduled meeting.

(5) The Board shall consider the written exceptions and any responses in rendering its final order.

B. Board Hearing:

(1) The written exceptions, and any responses thereto, shall be considered at a scheduled meeting by the Board, along with the ALJ's recommended order. The Board shall schedule and notify the parties of the hearing not later than five (5) days prior to the scheduled hearing. In the event any irreconcilable conflict exists on the hearing date, the party with the conflict shall immediately notify the Board and request a rescheduled hearing. In the event of a request for a rescheduled hearing, the Board shall attempt to schedule another hearing within fourteen (14) days.

(2) At the Board's hearing, each party or their representative shall be given thirty (30) minutes to present oral argument as to why the ALJ's recommended order should be adopted, modified or rejected.

The parties may file a proposed final order for consideration by the Board prior to or at the Board's hearing; however, no other pleading shall be filed.

(3) Following the oral argument, the Board shall deliberate and render a decision. The Board may seek clarification during its deliberation on specific points from the parties who are present, and/or from their authorized representatives, but shall not take or receive additional evidence. At any point during the deliberation, the Board may move to adopt the recommended order as its final order, or it may adopt a proposed final order submitted by the parties, provided such proposed order meets the requirements specified below.

(4) In rendering its final order, the Board shall proceed as follows:

(a) Adopt, reject, or modify the ALJ's findings of fact. The Board may not reject or modify the ALJ's findings of fact unless it determines from a review of the entire record, and states with particularity in its order, the findings of fact were not based upon competent substantial evidence.

As an example: *"Based upon its review of the entire record, the Board rejects the ALJ's findings of fact in paragraph 18 that the Respondent falsified his report dated October 23, 2005, because there was no competent substantial evidence supporting it, and instead finds, based upon the testimony of witness, John Doe, found at pages 23-25 of the transcript*

and Petitioner's exhibits A and B, that the respondent did falsify his report. The ALJ's other findings of fact are hereby adopted."

(b) Adopt, reject, or modify the ALJ's conclusions of law. The Board may not reject or modify the conclusions of law unless it states with particularity its reasons for rejecting or modifying them, and makes a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified.

As an example: *"The Board, based upon its review of the entire record, rejects the ALJ's conclusion of law in paragraph 25 that the Respondent did not violate Rule 3.1.b., and finds that it is more reasonable to conclude that the Respondent's behavior, as found by the ALJ in paragraphs 21 and 22, violated Rule 3.1.b. The ALJ's other conclusions of law are adopted."*

(c) Adopt, reject, or modify the ALJ's recommended penalty. The Board may accept the recommended penalty in the recommended order, but may not reduce it or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying its action. Additionally, as specified in the Special Act creating the Board, the Board may not

increase any penalty beyond that which formed the basis of the appeal.

As an example: *"The Board, based upon its review of the entire record, modifies the ALJ's recommended penalty from suspension to discharge, due to the egregious nature of the offense, and based upon the accumulated point score of the Respondent.*

(d) The Board must rule upon the exceptions filed.

As an example: *"The Board hereby rejects the exceptions filed by the Petitioner/Respondent."*

(5) The Board's legal counsel shall prepare and provide copies of the Board's final order to the parties within ten (10) days of the Board hearing.

(6) Board hearings shall be recorded and minutes prepared following each hearing by the Board reporter, and a copy of the minutes will be provided to the Board within (10) days of the hearing.

(7) Non-Board member attendees at the hearing may request permission of the Board Chair to speak, but they shall not be permitted to provide further evidence, and any comments shall be limited to the merits of the case being considered and shall not exceed three (3) minutes in duration.

(8) The Board members shall cast their individual votes by paper ballot, after which to be confirmed for accuracy by the Recorder.

8. ADOPTION OF RECOMMENDED ORDER:

Upon the passage of fifteen (15) days with no receipt by the Board of written exceptions from either party, the Board shall have the Recommended Order circulated to all members. Within an additional fifteen (15) days, any member of the Board may request a meeting of the Board to consider the adoption by the Board of the Recommended Order as the Final Order of the Board. In the event no such request is made, the Board by its Chairman, shall enter its Final Order, adopting the Recommended Order of the Department of Administrative Hearings.

Revised and Approved November 2, 2006

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LAW OFFICES

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May 14, 2008

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Senior Assistant County Attorney
Pinellas County, Office of County Attorney
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Re: *Pinellas County Sheriff's Office v. John Bradshaw*
Case No. 07-3719 / 07-04

Dear Ms. Mucklow and Mr. Afienko:

Enclosed herewith is a copy of Petitioner's Response to Respondent's Exceptions to Hearing Officer's Recommended Order faxed to you on May 12, 2008.

If you have any questions regarding the above, please feel free to contact me.

Sincerely,

FORD & HARRISON LLP

Benjamin R. Welling

BRW/pjc
Enclosure
TAMPA:246273.1

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SHERIFF'S OFFICE,

Petitioner,

v.

Case No.: 07-3719
07-04

JOHN BRADSHAW,

Respondent.
_____/

PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO HEARING OFFICER'S RECOMMENDED ORDER

Petitioner Pinellas County Sheriff's Office ("PCSO") hereby responds in opposition to Respondent John Bradshaw's Exceptions and states:

Bradshaw's Exceptions focus on his efforts to obtain relief under the Police Officers' Bill of Rights ("the Bill"), as codified in Section 112.532 et seq., Florida Statutes. The Hearing Officer properly concluded that a Circuit Court injunction is the exclusive remedy for violations of the Bill, and that this remedy could not be granted through the instant administrative proceeding, even though Petitioner violated the Bill's provision requiring discipline to be administered within a 180-day time frame.[1] This decision is based on the Bill's clear statutory language, as well as relevant case law interpreting the statute. Bradshaw now erroneously alleges that the Hearing Officer was in error in reaching each of these conclusions. Each of Bradshaw's Exceptions will be examined more fully below.

[1] Petitioner does not agree with the Hearing Officer's conclusion about its having violated the Bill's 180-day provision, it did not challenge this conclusion through an Exception, and does not challenge it here for purposes of this response.

The Hearing Officer Correctly Concluded That a Circuit Court Injunction Is the Exclusive Remedy for Violations of the Police Officers' Bill of Rights

Bradshaw takes issue with the Hearing Officer's conclusion that an injunction, issued by the Circuit Court, is the exclusive remedy for violations of the Bill. More specifically, Bradshaw argues that the Hearing Officer's reliance on two cases in support of this conclusion is misplaced because: 1) these cases were decided before an alleged amendment to Section 112.532, adding the 180-day provision here at issue; and 2) these cases did not directly consider the 180-day rule. Both of these contentions are ill supported and without merit.[2]

Bradshaw has no choice but to attempt to undercut these cases because they are unmistakably clear in holding that an injunction *is* indeed the exclusive remedy for violations of the Bill. *See Migliore v. City of Lauderhill*, 415 So. 2d 62, 64 (Fla. 4th DCA 1982) ("[Section 112.534] operates only to immediately restrain violation of the rights of police officers by compelling performance of the duties imposed by Sections 112.531 to 112.533"); *City of Miami v. Cosgrove*, 516 So. 2d 1125, 1127 (Fla. 3rd DCA 1987) ("Section 112.534 is the only remedy provision of Part VI of Chapter 112 . . . [and] provides only for a suit for an injunction"). Furthermore, the Circuit Court Order

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[2] It is noteworthy that Bradshaw has utterly failed to provide any supporting documentation and reasoning for his argument regarding the alleged amendment to Section 112.532. As noted in the Rule 7(A)(3) of the Pinellas County Sheriff's Civil Service Board Rules of Procedure, "[e]ach exception shall specify with particularity the finding of fact conclusion of law penalty, or recommendation(s) which is objectionable **and the reasons therefore**. The exceptions themselves shall **state with specificity** . . . that the conclusions of law excepted to departs from the essential requirements of law" (emphasis added). A vague reference to an amendment without any explanation regarding when the amendment was made, its purpose, the specific language that was amended, how this amendment is germane to the present case, etc. falls woefully short of Rule 7(A)(3)'s requirement of specificity. We note here also that nearly all of Bradshaw's Exceptions fall short for the same lack of specificity.

dismissing Bradshaw's tardy appeal to the court for an injunction (of which the Hearing Officer took judicial notice at the hearing) also accepted that an injunction is the sole remedy available under the Bill.

As to Bradshaw's first argument, the alleged amendment is a red herring, as Bradshaw does not even contend that there was an amendment to Section 112.534, the remedial provision that accompanies Section 112.532, which sets forth the requirement that a violation of Section 112.532 may be remedied only by a Circuit Court injunction. *Cosgrove* and *City of Lauderhill* support that there has not been any change to Section 112.534. It does not follow that a change to the underlying provisions of the Bill necessarily works a change to the remedial provision at issue here. Given Bradshaw's failure to provide any persuasive reason as to why these two on-point cases cannot be considered, it is clear that the Hearing Officer's reliance on *Cosgrove* and *City of Lauderhill* was appropriate in establishing that an injunction is the sole remedy available for violations of the Bill.

The Hearing Officer Correctly Concluded that the Administrative Proceeding Was Not the Proper Forum to Enforce the Police Officers' Bill of Rights

Bradshaw contends in his second Exception that the Hearing Officer failed to consider Petitioner's alleged contradictory argument during the Circuit Court injunction hearing. (Respondent's Exceptions pg. 3.) Bradshaw cites to the hearing transcript of the Circuit Court hearing on Bradshaw's petition for injunctive relief, in which counsel for Petitioner stated that the "exclusive remedy in our opinion is under the Civil Service Board." Inexplicably, Bradshaw makes this argument immediately after citing to Endnote 3 of the Recommended Order in which the Hearing Officer considered, and rejected, that very argument. The Hearing Officer correctly interpreted Petitioner's

statements as merely indicating that the "relief" or "remedy" to which Petitioner referred (and which Bradshaw sought) was a reversal of his discipline; and that Petitioner merely acknowledged that the present administrative proceeding was the proper place to seek such a reversal. Petitioner made no statement indicating or implying that the Bill could be enforced through this proceeding.

As noted above, the exclusive remedy for the violations of which Bradshaw complained is a Circuit Court injunction. Bradshaw made a calculated decision to move forward with his case, rather than seek an injunction in the proper forum, "because [he] felt [his] case was strong factually . . . and was hoping that the sheriff would recognize nothing happened." (Final Hearing Transcript pg. 28-29.) When things did not turn out in his favor, he sought an untimely injunction. He was unsuccessful because the Circuit Court recognized that he had waived the right to seek an injunction by waiting until after the disciplinary process was complete, and until after he had already served his four-day suspension, to file a petition with the court. Bradshaw now complains that Petitioner's well-founded argument that he waived the right to seek an injunction in Circuit Court, and that he cannot do so now in the present forum, is somehow procedurally unfair. However, Bradshaw fails to recognize that it was he, not Petitioner, who created the procedural predicament of which he complains by making a calculated decision to not seek an injunction at the proper time.

Bradshaw also challenges the Hearing Officer's conclusion that "the 180-day requirement cannot be raised as a defense in this administrative action," and that the "the Sheriff's Office cannot, through its statements, create subject matter jurisdiction." (Respondent's Exceptions pgs. 2-3.) The Hearing Officer correctly concluded that the

Bill could not be enforced through the instant administrative action because "noncompliance with the duties imposed by Section 112.53, Florida Statutes (2006), is exclusively enforced by injunction ordered by a circuit court." (Recommended Order at ¶ 56; *see also* Fla. Stat. § 112.534) (indicating that the Circuit Court is the proper forum to seek injunctive relief).

Petitioner re-cites the very same foreign case that he submitted to the Hearing Officer in connection with his Proposed Findings of Fact and Conclusions of Law – *In re City of Houston, Texas, and Houston Police Patrolmen's Union, Intn'l Union of Police Associations*, 105 LA 120 (1995). Once again, Bradshaw fails to offer any further explanation, as required by Rule 7(A)(3), as to why the Hearing Officer may have erred in already rejecting this case as unpersuasive. Bradshaw also cites two inapposite cases, both dealing with a statutory provision allowing municipalities to enact legislation governing the collective bargaining of public employees. *City of Panama v. PERC*, 364 So. 2d 109 (Fla. 1st DCA 1978); *Pinellas County v. PERC*, 379 So. 2d 985 (Fla. 2nd DCA 1980). This process entailed receiving approval of the proposed legislation from the Florida Public Employee Relations Commission ("PERC"). PERC was statutorily mandated to complete this approval process within 90 days of the municipality's submission of the proposed legislation for review. Because PERC delayed unnecessarily in both cases the court reversed PERC's decisions denying the proposed legislation.

Leaving aside the glaring lack of any relevant factual comparison between these cases and the present case, both of these cases are distinguishable and inapplicable on one very important point. In considering the penalty for violations of the 90-day provision, both cases noted that the relevant statutes did "not provide a specific penalty in the event

an agency violated the 90-day rule." *Pinellas County*, 379 So. 2d at 986; *see also City of Panama v. PERC*, 364 So. 2d at 114 (citing *Financial marketing Group, Inc. v. State, Dept. of Banking and Finance, Division of Securities*, 352 So. 2d 524 (Fla. 3rd DCA 1977)). Such is not the case with the Police Officers' Bill of Rights. Instead, as noted above, Section 112.534 clearly sets forth what the "penalty" for a violation of the 180-day provision is, namely, a Circuit Court order enjoining the process from moving forward. Bradshaw simply failed to take advantage of the remedial provision that was available to him, and in so doing, forfeited the opportunity to do so. Bradshaw can hardly complain that he is being deprived of "Due Process, the most fundamental legal principle of fairness and equity," when Bradshaw himself failed to take advantage of the due process available to him through Section 112.534, thereby waiving the right to do so. (Respondent's Exceptions at pg. 4.)

Bradshaw's Contention that Petitioner Lacked "Jurisdiction" to Discipline Him Is Without Merit

Bradshaw boldly asserts in his Exceptions: "It's not the Judge that is without jurisdiction, it's the Sheriff's Office that lacks jurisdiction." (Respondent's Exceptions at pg. 5.) More specifically, Bradshaw contends that Section 112.532(6)(a), quoted in the Exceptions, acts as a bar to Petitioner's discipline. In drawing this conclusion, Bradshaw takes it upon himself to interpret Section 112.532(6)(a), but offers no authority in support of his interpretation. More importantly, Bradshaw once again ignores the clear language of Section 112.534, which refutes his interpretation by clearly noting that an injunction (not loss of "jurisdiction") is the exclusive remedy available under the Bill. *See City of Lauderhill*, 415 So. 2d at 64. Section 112.534 provides in its entirety:

112.534. Failure to comply; official misconduct

(1) **If any law enforcement agency or correctional agency fails to comply with the requirements of this part**, a law enforcement officer or correctional officer employed by or appointed to such agency who is personally injured by such failure to comply **may apply directly to the circuit court** of the county wherein such agency is headquartered and permanently resides **for an injunction to restrain and enjoin such violation of the provisions** of this part and to compel the performance of the duties imposed by this part.

(2) All the provisions of s. 838.022 shall apply to this part

(emphasis added). Nowhere in the sole remedial provision of the Police Officers' Bill of Rights is an agency stripped of jurisdiction to investigate or discipline its own employees because of a violation of the Bill's provisions. Rather, the process can only be enjoined and restrained through an injunction. By Bradshaw's own admission, he merely objected to the investigation, but did not file a timely petition with the Circuit Court to enjoin and restrain Petitioner's investigation from moving forward. (Respondent's Exceptions pgs. 2, 5.) As such, the Hearing Officer correctly concluded that, even though Petitioner violated the Police Officers' Bill of Rights by failing to discipline Bradshaw within the 180-day time frame, Petitioner was not automatically stripped of the ability to continue to investigation and discipline its own employees.

WHEREFORE, Petitioner requests that Bradshaw's Exceptions be denied and that the Civil Service Board adopt and enter the Hearing Officer's Recommended Order.

Respectfully submitted,

FORD & HARRISON LLP

By: _____
Benjamin R. Welling
Florida Bar No. 0016286

For the firm

101 East Kennedy Boulevard
Suite 900
Tampa, Florida 33602-5133
Telephone: (813) 261-7800
Facsimile: (813) 261-7899

Attorney for Petitioner PINELLAS COUNTY SHERIFF'S OFFICE

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2008, a copy of the foregoing was sent via facsimile to:

Kenneth J. Afienko
Kenneth J. Afienko, P.A.
560 First Avenue North
St. Petersburg, FL 33701
Facsimile: 727-894-0797

Suzanne M. Mucklow
Senior Assistant County Attorney
Pinellas County, Office of County Attorney
315 Court Street
Clearwater, FL 33756
Facsimile: 727-464-4147

on this 12th day of **May, 2008**.

_____
Attorney

TAMPA:245642.1

Kenneth J. Afienko, P.A.

Trial Lawyer
560 First Avenue North • St.Petersburg, FL 33701 • (727) 894-5392 • Fax: (727) 894-0797
www.foplawyer.com
Email: kafienko@tampabay.rr.com

April 24, 2008

Suzanne M Mucklow
Senior Assistant County Attorney
315 Court Street
Clearwater, FL 33756

Re: ***Civil Service Appeal, Deputy John Bradshaw***
DOAH Case No. 07-3719

Dear Ms. Mucklow:

Enclosed you will find Deputy Bradshaw's exceptions to the Recommended Order of Bram D.E. Canter which was rendered on April 18, 2008.

In addition, you will find copies of:

1. **In re City of Houston, Texas and Houston Police Patrolmen's Union, International Union of Police Associations**, 105 LA 120 (1995).

2. **Pinellas County v. Florida Public Employees Relations Commission**, 379 So.2d 985 (2nd DCA 1980).

3. **City of Panama City v. Florida Public Employees Relations Commission**, 364 So.2d 109 (1st DCA 1978).

4. **Migliore v. City of Lauderhill**, 415 So.2d 62 (4th DCA 1982).

5. **City of Miami v. Cosgrove**, 516 So.2d 1125 (3rd DCA 1987).

6. 112.534 and 112.532, Florida Statutes.

7. Copy of transcript of Circuit Court hearing on 12/14/07 before Judge Shames.

8. Pages 1-5 of Deputy Bradshaw's investigative interview on 6/19/07.

9. Order of the Circuit Court dated 1/16/08.

Please let me know when the Civil Service Board hearing will be so that I can properly prepare for same.

Thank you for your attention this matter and should you have any questions, please feel free to contact me.

Sincerely,

Kenneth Afienko

KJA/akp
enclosures

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SHERIFF'S OFFICE, Petitioner, v. JOHN BRADSHAW, Respondent.	)	Case No. 07-3719

RESPONDENT'S EXCEPTIONS TO HEARING OFFICER'S RECOMMENDED ORDER

COMES NOW, the Respondent, JOHN BRADSHAW, by and through his undersigned counsel, in accordance with Sections 120.569 and 120.57(1), Florida Statutes, and Rule 28-106.217(k), Florida Administrative Code, hereby submits these exceptions to the hearing officer's Recommended Order rendered on April 18, 2008, and states the following:

STATEMENT OF THE ISSUES

1) Whether Respondent violated Rules and Regulations of the Petitioner and, If determined that Respondent did violate Rules and Regulations of the Petitioner, was his discipline disparate in nature by being too severe?

2) Whether Petitioner is barred from imposing discipline pursuant to the Police Officers' Bill of Rights found in Section 112.532(6), Florida Statutes, by imposing discipline beyond 180 days from the date of the alleged violation and, whether this is the proper forum to hear matters concerning the application of Section 112.532(6), Florida Statutes?

EXCEPTIONS:

Respondent, John Bradshaw, files these exceptions and argues that the Administrative Law Judge (Judge) failed to comply with the essential requirements of law for the following reasons:

Paragraph 56 at Page 22: The Judge incorrectly concludes that the "exclusive remedy" for noncompliance with Section 112.532, Florida Statutes, is an action in the circuit court for injunctive relief and cites two cases that allegedly stand for that proposition. The Judge incorrectly relies on the holdings found in the **Cosgrove and City of Lauderhill** cases which were decided well before the legislature amended Section 112. 532, Florida Statutes, to include the 180-day rule Statute of Limitation. The holdings in **Cosgrove and City of Lauderhill** have no application since the 180-day rule operates as a form of Statute of Limitation which was not an issue addressed by the respective courts. Furthermore, the Judge incorrectly cites in **Paragraph 56, Page 23**, that the **City of Lauderhill** case mandates that a violation of rights can only be "immediately" restrained. As pointed out earlier, the **City of Lauderhill** case was decided in 1982, well before the 180-day rule was amended into the statute.

However, the Judge correctly points out in **Paragraphs 54 and 55 of Page 22** that Deputy Bradshaw unsuccessfully filed an action in Circuit Court asking the court to hold that the Sheriff's imposition of discipline was null and void due to the 180-day rule violation. The court subsequently ruled that Deputy Bradshaw could not seek relief in the Circuit Court due to the Court being unable to rescind punishment that had been already served. (See Order of Court).

The Judge indicates in endnote 3 that the Sheriff's Office, referencing the transcript of the Circuit Court hearing, "merely stated that the administrative proceeding was the 'proper place'

for the 'relief' sought by Deputy Bradshaw. That is not the same thing as asserting that the administrative proceeding is the proper place to raise the 180-day issue. Furthermore, the Sheriff's Office cannot, through its statements, create subject matter jurisdiction."

However, the Judge fails to recognize that the Sheriff's Office argued that the " . . . exclusive remedy in our opinion is under the Civil Service Board because of the timing of when he filed." (See Circuit Court transcript at page 8).

The Sheriff's Office violated Deputy Bradshaw's Police Officer's Bill of Rights guaranteed contained in Section 112.532, Florida Statutes, by conducting an investigation well beyond 180-days after receiving information about a possible violation. They then advanced the argument in Circuit Court that the appropriate remedy was with the Civil Service Board, yet changed their legal position at the Civil Service Hearing, claiming that the 180-day rule argument was not appropriate. The Sheriff's Office violated Deputy Bradshaw's rights by not conducting the investigation within the parameters set forth in Section 112.532, as correctly pointed out by the Judge in **Paragraph 50, Page 20**, however, the Judge states that he does not have jurisdiction to resolve this issue. The Judge relies on no case law or any other legal authority to come to this conclusion.

By concluding that the Judge had no jurisdiction to resolve the 180-day rule violation, he ignores established law in other jurisdictions concerning similar statutes as pointed out by Respondent in **In re City of Houston, Texas and Houston Police Patrolmen's Union, International Union of Police Associations**, 105 LA 120 (1995). In **In re City of Houston, Texas and Houston Police Patrolmen's Union, International Union of Police Associations**, the Administrative Law Judge recognized state law and dismissed a disciplinary action that was

beyond the 180-day limit.

Additionally, **Pinellas County v. Florida Public Employees Relations Commission**, 379 So.2d 985 (2nd DCA 1980) and **City of Panama City v. Florida Public Employees Relations Commission**, 364 So.2d 109 (1st DCA 1978) held that it was a material error for the Florida Public Employees Relations Commission to violate the 90-day rule which denied employees' rights to have the matter decided in a timely fashion. The courts in these cases recognized that the 90-day limitation provided in the statute was a bar to any further action by the Florida Public Employees Relations Commission.

To deprive Deputy Bradshaw of any legal remedy to address the 180-day rule violation is the equivalent of depriving him of Due Process, the most fundamental legal principle of fairness and equity which is guaranteed to him by Section 112.532(6)(a), Florida Statutes, otherwise known as the Police Officer's Bill of Rights. Section 112.532(6)(a), Florida Statutes, states, in part:

"Except as provided in this subsection, *no disciplinary action, demotion, or dismissal shall be undertaken by an agency against a law enforcement officer or correctional officer for any act, omission, or other allegation of misconduct if the investigation of such allegation is not completed within 180 days after the date the agency receives notice of the allegation by a person authorized by the agency to initiate an investigation of the misconduct*. In the event that the agency determines that disciplinary action is appropriate, it shall complete its investigation and give notice in writing to the law enforcement officer or correctional officer of its intent to proceed with disciplinary action, along with a proposal of the action sought. Such notice to the officer shall be provided within 180 days after the date the agency received notice of the alleged misconduct." (Emphasis Added).

The Judge also incorrectly states in **Paragraph 56, Page 22**, that the "exclusive remedy" for non-compliance with Section 112.532, Florida Statutes, is an injunction in the circuit court. Nowhere in Section 112.532 or 112.534, Florida Statutes, does it say that the "exclusive remedy"

is an action in the circuit court for injunctive relief.

The Judge also fails to recognize that the language contained in Section 112.532(6)(a) operates as a bar to agency discipline. The facts of the instant case provide for no "revival" of the investigation once 180 days has passed. Because the Sheriff's Office disciplined Deputy Bradshaw well beyond 180 days after learning of the alleged misconduct, the Sheriff's Office was without jurisdiction to discipline Deputy Bradshaw, irregardless of Deputy Bradshaw seeking an injunction after receiving discipline. Additionally, Deputy Bradshaw never provided a waiver of his rights concerning the 180-day rule pursuant to subsection (6)(a)(1) of the statute. As a matter of fact, Deputy Bradshaw objected to the investigation on the day of his interview, however, he was threatened with termination if he didn't testify. Because of the threat of termination, and only because of the threat of termination, did Deputy Bradshaw provide a statement. (See Deputy Bradshaw Interview).

To suggest that the Judge had no jurisdiction to rescind the discipline is without merit. The Judge is tasked with the responsibility of resolving issues of fact and deciding issues of law. As the Judge correctly noted in **Paragraph 50, Page 20**, the Sheriff violated the 180-day rule in the instant case. It's not the Judge that is without jurisdiction, it's the Sheriff's Office that lacks jurisdiction. Because the Sheriff's Office lacked jurisdiction to discipline Deputy Bradshaw, the Civil Service Board should reject the Conclusions of Law of the Judge as it pertains to the 180-rule argument and rescind the discipline imposed against Deputy Bradshaw.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail to Benjamin R. Welling, Esq., 101 East Kennedy Blvd., Suite 900, Tampa, FL 33602, and Suzanne M Mucklow, Esq., County Attorney's Office, 315 Court Street, Clearwater, FL 33756 on this 24th day of April, 2008.

Kenneth J. Afienko, Esq.
560 1st Ave. North
St.Petersburg, FL 33701
(727) 894-5392
FBN: 145939
Attorney for Respondent, John Bradshaw

In arriving at my decision in this matter, I have considered each and every argument advanced by the parties that I believe are relevant and material to the issue. Failure to discuss all of them does not mean they have not been duly considered in my deliberation.

AWARD

Based on the entire record in this matter, I find and conclude that Mead Coated Board did not violate the collective bargaining agreement by contracting out the clean up work in the woodyard in November, 1993. Therefore, the Union's grievance is denied.

CITY OF HOUSTON, TEXAS —

Decision of Arbitrator

In re CITY OF HOUSTON, TEXAS **and** HOUSTON POLICE PATROLMEN'S UNION, INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AAA Case No. 70-390-0075-94, September 6, 1995

Arbitrator: Harold E. Moore

DISCIPLINE

— Time limits — State law ▸100.5507 ▸100.5523 ▸100.30 ▸100.0764

Four-day suspension that city issued to police officer 250 days after it became aware of underlying incident violated state law under which city may order only indefinite suspensions if more than 180 days pass after date of discovery of act, despite argument that if city cannot discipline for inappropriate actions because of time spent on investigation, it will be forced into either immediately issuing possibly ill-advised suspensions, or later taking no action at all regarding lesser rule infractions if indefinite suspension is not deemed appropriate; arbitrator lacks authority to ignore clear and unambiguous statutory language.

Appearances: For the employer — Brian J. Begle, assistant city attorney. For the union — Burt Springer, attorney [representative].

TIME LIMITS

Background

MOORE, Arbitrator: — The arbitration appeal hearing regarding a four day suspension of C— was scheduled for July 7, 1995. Before the receipt of any evidence or testimony by the hearing officer, counsel for the Grievant filed a written motion for a Summary Award and Request for a Bifurcated Hearing. The City did not oppose the bifurcation of the issues. The parties filed briefs supporting their respective positions. It is the hearing examiner's understanding that this is a case of first impression.

Facts

The Houston Police Department was notified on January 27, 1994, of an incident involving the Grievant which occurred on January 26, 1994. The Texas Local Government Code sets a 180 day time limit for the Chief of Police to take disciplinary action against a police officer. There is an exception to the 180 days limit if the act involves a felony or other crime of moral turpitude. In those cases the time limits may be extended if written notification is sent to the Texas Attorney General. In the instant case there was an initial question as to the incident involving a possible criminal violation. After investigating the incident, the City determined that the Grievant warranted a four day suspension without pay instead of an indefinite suspension. The Grievant was notified of his suspension October 4, 1994. This was 250 days after the City became aware of the incident.

Applicable Statutes

Texas Local Government Code:

Sec. 143.117

"The head of the fire or police department may suspend a fire fighter or police officer under the department head's supervision or jurisdiction for disciplinary reasons for a reasonable period not to exceed 15 days."

"However, the department head may not suspend a fire fighter or police officer later than the 180th day after the date the department discovers or became aware of the Civil Service rule violated."

Sec.143.117(h)

"The department head may order an indefinite suspension based on an act classified as a felony or any other crime involving moral turpitude after the 180 day period following the date of discovery of the act by the department head if the department head considers delay to be necessary to protect a criminal investigation of the person's conduct. If the department head intends to order an indefinite suspension after the 180 day period, the department head must file with the attorney general a statement describing the criminal investigation and its objectives within the 180 days after the date the act complained of occurred."

Section 143.119(a)

"The head of the fire or police department may indefinitly suspend a fire fighter or

police officer under the department head's supervision or jurisdiction for the violation of a civil service rule."

The Employee's Argument

The Texas Local Government Code makes a distinction between a suspension of up to 15 days and an indefinite suspension. The City must take action for a suspension of 15 days or less within the 180 day limitation. The 180 days may be extended if it involves an indefinite suspension. In this case the Grievant was not assessed a 4 day suspension until 250 days after the City had knowledge of the incident.

The City's Argument

In order to determine legislative intent, the statute must be looked at as a whole and not its isolated provisions. The discipline of police officers is to be handled in a way which is fair to both the officers and the citizens they protect. If the City cannot issue discipline for inappropriate actions because of the time spent procuring a more detailed investigation, they will be forced into either immediate issuance of a possibly ill advised suspension without appropriate investigation, or later taking no action at all regarding lesser rule infractions if indefinite suspension is not deemed appropriate. The provisions which allow the City to extend the time for an indefinite suspension during a criminal investigation must also apply to a temporary suspension in order to give full credence to the statute as a whole.

Discussion

Neither party offered court decisions on the specific question involved in this motion. Nor has the hearing examiner been furnished legislative testimony leading up to the passage of Section 143 of the Texas Local Government Code. Therefore, the hearing examiner is left with interpreting the language as written.

Section 142.117 authorizes the department head to *suspend* a police officer for a period not to exceed 15 days. Section 143.119 refers to *indefinite suspension*. Also, in the application of human resource management, there is a difference between suspension and indefinite suspension. Suspension is normally referred to as a disciplinary lay off of a specific time limit. Indefinite suspension is another term for termination of employment, and has been so applied by the parties in the past.

Whether the Texas Legislature intended to create two sections of the statute dealing with two forms of punishment available to a department head is not stated in the statute. However, the clear language of the statute, as it is applied to the commonly accepted standards of human resources, must be interpreted as having done so.

A department head has two options available to him or her; (1) temporarily suspend an employee for a period up to 15 days or, (2) indefinitely suspend an employee. This must be done no "later than the 180th day after the department discovers or becomes aware of the" rule violation. The 180 day limitation may be extended "If the department head intends to order an *indefinite suspension*..." and "...files with the attorney general a statement..." The statute does not provide for an extension for a *temporary suspension*.

The City points out in its argument that if the Grievant's position is upheld that the department head would be forced to issue an indefinite suspension in all cases where a Section 143.117(h) incident occurred. There is no prohibition in the statute that would prohibit a department head from issuing a *suspension* of up to 15 days during the 180 day period.

There is considerable arbitratable authority to the effect that human resources matters should not be resolved because of a technicality. But, to extend the 180 day time limit for an *indefinite suspension* to cover a *temporary suspension*, in light of the clear and unambiguous language of the statute, is not within the authority of a hearing examiner. A hearing examiner's authority is limited to interpretation not legislation.

Decision

The motion of C— for a Summary Award is granted. The four day suspension was assessed beyond the 180 days as specified by Texas Local Government Code Section 143.117. Officer C— shall be made whole for all loss of pay, seniority, and other benefits he may have lost during the 4 day period.

AWARD

In accordance with the discussion and decision set forth above, motion granted.

ARCH OF WEST VIRGINIA —

Decision of Arbitrator

In re ARCH OF WEST VIRGINIA and UNITED MINE WORKERS OF AMERICA, LOCAL 5958, Case No. 93-17-94-46, August 28, 1995

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379 So.2d 985
106 L.R.R.M. (BNA) 2593
PINELLAS COUNTY, Florida, Petitioner,
v.
FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION, Respondent.
No. 79-628.
District Court of Appeal of Florida, Second District.
Jan. 25, 1980.
Rehearing Denied Feb. 15, 1980.

Leslie M. Conklin and W. Gray Dunlap, Clearwater, and John-Edward Alley and Robert D. Hall, Jr. of Alley & Alley, Tampa, for petitioner.

Vernon Townes Grizzard, Staff Counsel, Tallahassee, for respondent.

HOBSON, Acting Chief Judge.

The Board of County Commissioners of Pinellas County (county) seeks review of a final order rendered by the Florida Public Employees Relations Commission (PERC) which denied the County's application for approval of local option ordinance No. 76-20, submitted pursuant to Section 447.603, Florida Statutes (1975). We reverse.

In 1974, the Florida legislature enacted Part II of Chapter 447, Florida Statutes (the Tucker Act). The act established the Public Employees Relations Commission and delegated to it the task of supervising collective bargaining by public employees. On February 4, 1975, Pinellas County submitted local option ordinance No. 75-4 to PERC for approval. The ordinance was drafted under the authority of Section 447.603, Florida Statutes, which provided:

447.603 Local option. Any district school board or political subdivision, other than the state or a state public authority, may elect to adopt, by ordinance, resolution, or charter amendment, its own provisions and procedures in lieu of the requirement of this part, provided such provisions and procedures effectively secure to public employees substantially equivalent rights and procedures as set forth in this part. Prior to (such provisions and procedures) becoming law, the public employer shall apply to the commission for review and approval as to whether local provisions or procedures, or both, are substantially equivalent to the provisions and procedures set forth in this part. All public employee agreements now in existence shall remain in effect until their expiration.

Seven months later, on September 17, 1975, PERC conducted a hearing on the proposed ordinance. On February 26, 1976, hearing officer Curtis L. Mack issued a staff recommendation and analysis which specified 94 deficiencies in the subject ordinance. At a hearing before PERC on March 3, 1976, further oral argument was heard and the application for approval was denied. On August 25, 1976, the county filed ordinance No. 76-20 for approval, which substantially amended the original local option ordinance.

Ordinance No. 76-20 was assigned to a PERC attorney for research and investigation. On May 25, 1978 (nearly two years after the amended ordinance was

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submitted), the investigating agent recommended that the local option application be denied. His report found that the ordinance, as amended and resubmitted, conformed to some 91 changes suggested in the prior hearing officer's report of February 26, 1976; however, the recommended order suggested 12 additional

changes that would be necessary in order to secure approval. PERC granted the county additional time to file exceptions and brief and on June 19, 1978, the county did so file. On September 11, 1978, oral argument on the exceptions to the recommended order was heard. Six months later, the county filed a petition with this court seeking relief which would require PERC to approve the local option ordinance on the ground that PERC had abused the "90-day rule" of Section 120.59 (Florida Statutes). The following day, March 22, 1979, PERC entered the final order denying approval of the local option application. This order was rendered 192 days following oral argument, two and one-half years after the county submitted amended ordinance No. 76-20 and over four years after the county filed its initial application for approval of ordinance 75-4.

DISCUSSION

Section 120.59, Florida Statutes, provides:

(1) The final order in a proceeding which affects substantial interests shall be in writing or stated in the record and include findings of fact and conclusions of law separately stated, and it Shall be rendered within ninety days:

(a) After the hearing is concluded, if conducted by the agency,

(b) After a recommended order is submitted to the agency and mailed to all parties, if the hearing is conducted by a hearing officer, or

(c) After the agency has received the written and oral material it has authorized to be submitted, if there has been no hearing.

The ninety day period may be waived or extended with the consent of all parties. (Emphasis ours)

Although the above-quoted section does not provide a specific penalty in the event an agency violates the 90-day rule, Section 120.68, Florida Statutes, which deals with judicial review, sets out in subsection (8):

The court shall remand the case for further agency action if it finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure.

The county argues that under the authority of City of Panama City v. PERC, 364 So.2d 109 (Fla. 1st DCA 1978), this court must reverse PERC's final order and remand the cause with directions that the local option ordinance be approved as it now stands. The facts of the Panama City case are strikingly similar to those in the instant case. In Panama City, the city filed a petition seeking review of an order of PERC which denied approval of a similar local option ordinance. The city filed its proposed ordinance in December 1974 and, after hearings, adopted an amended ordinance to conform to the concept of "substantial equivalency." A hearing was held on the amended ordinance in April 1976. PERC rendered an oral decision which approved the ordinance subject to certain modifications and conditions. Over a year later, PERC redetermined the issue of the substantial equivalency of the ordinance and entered its order denying approval. The First District Court approved PERC's findings concerning the deficiencies in the submitted ordinance and substantially agreed with PERC on the merits of the case. Nevertheless, the court reversed the order and remanded with directions that the city's local option ordinance be approved. The basis on which the court granted its reversal was that "PERC flagrantly disregarded the time provision in the statute and the rights of the city and its employees to have their status timely determined. Clearly the fairness of the proceedings has been impaired." Panama City at 114. The Panama City court cited with approval the case of Financial Marketing

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Group, Inc. v. State Department of Banking & Finance, Div. of Securities, 352 So.2d 524 (Fla. 3d DCA 1977), in which that court reversed a

final agency order which denied a security dealer's license. The reversal was based on the fact that the agency's final order was improper where the agency did not have before it a full transcript of the proceedings before the hearing examiner and had apparently reversed his findings of fact. The court noted that PERC had failed to render its final order within 90 days and remarked:

> We certainly agree that the State agencies should follow mandates of the Legislature. We further observe that the regulatory agencies should not frustrate a citizen's attempt to secure a license to pursue a vocation or profession by inaction. If there were no other basis to reverse the agency's action under review, we might adopt the penalty suggested by the petitioners and require the issuance of the licenses because of the failure of the respondent to follow the mandatory provisions of Section 120.59, Florida Statutes.
>
> Financial Marketing at 525.

We have examined the record of the case under review to determine whether or not "the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure." It is our considered opinion that the county diligently pursued a course of action designed to acquire PERC's approval of its local option ordinance. These efforts were met with delay and inaction, for whatever reason, by PERC. Although we realize the importance of thorough investigation by the commission in order to determine whether the submitted ordinance meets statutory requirements, certainly there was more than enough time to handle this matter in the two and one-half year period after its second submission. When the legislature saw fit to delegate extensive responsibility to PERC through the Tucker Act and, further, to place certain time limits on the execution of this responsibility, we assume that the purpose was to assure efficient resolution of collective bargaining matters. Although extenuating circumstances might exist in certain situations which would relieve PERC from strict compliance with the 90-day rule, we can find no such extenuating circumstances in this case. Whatever the motives or reasons which prompted this flagrant disregard for the statutory time limit, the result is a material error in procedure which requires redress by this court. If PERC's primary consideration in the matter had been to assure a substantially equivalent local option ordinance for the benefit of county employees, it had more than sufficient time in which to do so. If the investigation appeared to require more than 90 days, PERC should have at least requested that the county stipulate to a definite period of extension.

Therefore, we grant the petition for review and reverse the final order which denied approval of Pinellas County's local option ordinance No. 76-20. We remand the cause for the county to amend said ordinance where necessary to bring it into substantial compliance with Chapter 447, Part II, as amended by Chapter 77-343, Laws of Florida. City of Panama City v. PERC, 378 So.2d 66 (Fla. 1st DCA 1979). Upon said amended ordinance being filed with PERC, the commission is ordered to grant immediate approval.

REVERSED and REMANDED.

OTT and RYDER, JJ., concur.

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364 So.2d 109
100 L.R.R.M. (BNA) 2130
CITY OF PANAMA CITY, Florida, Petitioner,
v.
The FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION, Respondent.
No. GG-362.
District Court of Appeal of Florida, First District.
Nov. 17, 1978.

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John-Edward Alley and Richard R. Parker, of Alley & Alley, Miami, Rowlett W. Bryant, of Sales, Bryant, Daniels & Thompson, Panama City, and Alley & Alley, Miami, for petitioner.

Leonard Carson, C. Anthony Cleveland and Anne M. Parker, Tallahassee, for respondent.

BOYER, Acting Chief Judge.

By this petition for review, the City of Panama City (City) seeks review of an order of the Florida Public Employees Relations Commission (PERC) denying approval of the City's local option ordinance.

F.S. 447.603 provides that municipalities may adopt local ordinances governing collective bargaining relationships between the municipality and its employees. Prior to becoming law, the municipality must apply to PERC for review and approval as to whether the provisions or procedures in the local ordinance are "substantially equivalent" to the provisions and procedures set

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forth in the Public Employees Relations Act (PERA). After the local option ordinance becomes law, it operates in lieu of the requirements of PERA.

In December, 1974, the City filed with PERC local ordinance number 912, a local option ordinance governing labor relations between the City and its employees. A public hearing was set to determine the question of substantial equivalency of the ordinance. However, prior to the hearing, the City adopted ordinance number 933, an amended version of ordinance number 912, which the City contends better conforms to the parameters of the concept of substantial equivalency which was espoused by PERC in another local option case. The City attempted to present oral argument on the amended ordinance at the scheduled hearing before PERC, but the Chairman declined to hear arguments, reasoning that the parties had not been given sufficient time to study it. In April, 1976, a hearing was finally held on City ordinance number 933. At that hearing, the Commission rendered an oral decision which approved the ordinance subject to certain modifications and conditions. During a workshop held over a year later, the Commission redetermined the issue of the substantial equivalency of the ordinance. Thereafter, the Commission entered its order denying approval.

The City raises as its first error the question of whether PERC erroneously rejected the City's local option ordinance by incorrectly construing F.S. 447.603 to require a "substantial departure" standard of review.

Initially, we note that PERC found nine deficiencies in the submitted local option. Of those nine deficiencies enumerated by PERC, only two mention the test of substantial departure and one of those, in the same paragraph, also mentioned the standard

"substantially equivalent". Therefore, it does not appear that PERC used an improper standard of review when throughout the order here appealed the standard of "substantially equivalent" was used.

We approve on the merits PERC's findings concerning the following eight deficiencies in the submitted local option: A registration procedure which did not recognize previous registration with the Commission, thus subjecting an employee organization to the burden of multiple registration, and required additional registration requirements; an impasse procedure which focused attention on factors significant to impasse resolution not found in the act; a strike penalty clause which erroneously referred to the state act rather than the local ordinance; a certification clause which failed to honor certifications already issued by the Commission; a clause providing that all rules of the local Commission became effective upon City Commission approval, without providing for Commission approval as required by Section 447.603 of the Act and Fla. Administrative Code Rule 8H-7.08; a lack of any provision requiring the local option to accept jurisdiction of cases pending before the Commission and to grant such cases expedited treatment; a clause providing that the local option will become effective upon submission to the Commission, which is contrary to both the mandates of F.S. 447.603 and established case law; and the lack of any provision requiring Commission approval of any subsequent amendment to the ordinance, which is inconsistent with the Commission's continuous duty to insure that a local option grants public employees rights and procedures substantially equivalent to those found in the act. However, concerning PERC's finding that "a local Commission consisting of only three members does not secure to public employees rights and procedures substantially equivalent to those provided by the five member Commission with a three member quorum as established by the act" we must reverse. Whether or not there are three members or five members on the Commission does not substantially affect the rights secured by the act.

In its second point, the City contends that PERC, by deviating from its prior holdings without providing explanation or justification for the departure, committed an abuse of discretion. However, concerning

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this alleged error, we must agree with PERC that where the order here appealed departed from prior Commission rulings, the order fully explained the rationale of the Commission and the factors which compelled the modification of its prior decision. The requirements set forth in McDonald v. Department of Banking & Finance, 346 So.2d 569 (Fla. 1st DCA 1977), in so far as here applicable, were satisfied.

In its third point, the City urges that PERC's oral decision of April 7, 1976, conditionally approving the local option ordinance, should be viewed as a final order approving the ordinance and that since the Commission failed to reduce its order to writing, the Commission should be estopped from later denying the res judicata effect of that oral order. On the other hand, PERC contends that an agency decision is not final until it is reduced to writing under F.S. 120.52(9) and that the Commission's oral decision was clearly conditional and ambiguous, and was not an unequivocal ruling duly recorded in the Commission minutes. (Shevin ex rel. State v. Public Service Commission, 333 So.2d 9 (Fla.1976)) We are persuaded that the oral decision conditionally approving the local option ordinance cannot be considered as a final order of PERC. It simply was not an unequivocal, unambiguous decision embodied in an official record which would substitute for a written order for the purposes of F.S. 120.52(9) and F.S. 120.68(1).

Next, the City raises as error PERC's conclusion that F.S. 447.603 requires approval by PERC of a local option ordinance before it becomes law. That issue was addressed by Judge Grimes of the Second District Court of Appeal in Public Employees Relations Commission v.

City of Naples, 327 So.2d 41 (Fla. 2nd DCA 1976) and was fully explored. We quote with approval relevant portions of that opinion:

"Thus, the issue boils down to whether PERC's approval of the provisions and procedures established by the city's ordinance is required before the city is entitled to assume jurisdiction of the public employees bargaining procedure.

"The city argues that the statute doesn't specifically say that PERC's approval is a condition precedent to the effectiveness of the ordinance. The city suggests that the legislature simply intended that PERC would act as a watchdog whereby it would have the right to attack in the courts any local ordinance deemed to be insufficient. On the other hand, PERC points to the fact that the statute requires the public employer to apply to 'the commission for review and approval' of its provisions and procedures. PERC suggests that to adopt the city's position would permit a local entity to pass an ordinance establishing any kind of provisions or procedures and to place the burden upon PERC to seek to have it set aside.

"On balance, we are persuaded that PERC's position must prevail. It is obvious that the Tucker Act represents the result of a comprehensive effort to establish an orderly process for the administration of collective bargaining with public employees. There are detailed provisions for determining the employee organization which is entitled to act as bargaining agent for each bargaining unit, and there is a method provided to handle charges of unfair labor practices. Many of the procedures appear to be similar to those followed in labor matters on the federal level. In this complex area of the law, it is important to have reasonably consistent interpretations. Therefore, if public employee relations are in some instances to be supervised on the local level, logic dictates that from the outset the procedures to be followed should be substantially similar to those employed by PERC.

"The city contends that its position is consistent with the decentralization philosophy expressed by the constitutional and legislative 'Home Rule' provisions. However, Article VIII, Section 2(b) of the Florida Constitution establishes a grant of powers to municipalities 'except as otherwise provided by law,' and Fla.Stat. § 166.021(3)(c) (1973) provides that municipalities may enact legislation upon any

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subject matter except those 'expressly preempted to state . . . government . . . by general law.' We believe that by the passage of the Tucker Act the legislature has seen fit to preempt to the state the subject of public employee bargaining to the extent that a municipality can have no jurisdiction unless the provisions and procedures of its ordinance have been approved by PERC. The Circuit Court of the Fourteenth Judicial Circuit recently reached a similar conclusion in Police Benevolent Association v. The Municipality of Panama City, Florida, Case No. 74-1363, Order entered September 5, 1975." (327 So.2d at pages 42 and 43.)

In approving such procedure, we note (as did Judge Grimes in the last above cited case) that PERC's determination concerning the substantially equivalency of a local option ordinance is subject to judicial review; therefore appropriate protection is afforded to the municipality.

Finally, the City urges as error PERC's failure to render an order containing separate findings of fact and conclusions of law and its failure to state in writing those findings of fact and conclusions of law within ninety days of its oral order of conditional approval; claiming that such constitutes a material error in procedure which impaired the fairness of the proceeding. PERC contends that its order sufficiently complies with F.S. 120.57(2)(a)(1) and (2), that although the final order is not a model of perfection, nevertheless it is not violative of F.S. 120.59(1) for failure to separately state the findings of fact and conclusions of law, and that the ninety day requirement of F.S. 120.59(1)(a) is mooted by the issuance of the order which

constitutes the basis of this appeal. While agreeing that the challenged order is no model, we are nevertheless persuaded that under the rationale of Pasco County School Board v. Florida Public Employees Relations Commission, 353 So.2d 108 (Fla. 1st DCA 1977) it is sufficient.

However, we find merit in the City's argument that PERC's failure to render its order within ninety days of the hearing constituted, under the facts of this case, a material error in procedure which impaired the fairness of the proceeding. The City began seeking approval in 1974 and it was not until June 6, 1977 that PERC finally entered its order. Neither PERA nor the APA were intended by the legislature to be used as tools of frustration. We had occasion to address the issue in G & B of Jacksonville, Inc., etc., v. State of Florida, Department of Business Regulation, etc., 362 So.2d 951, 955 (Fla. 1st DCA 1978), wherein we said:

"Petitioner next challenges the subject order on the basis of timeliness, citing F.S. 120.59 which requires that: 'The final order in a proceeding which affects substantial interests shall be in writing or stated in the record * * * and it shall be rendered within 90 days * * * after a recommended order is submitted to the agency and mailed to all parties, if the hearing is conducted by a hearing officer * * * '. The statute further provides that the 90-day period may be waived or extended with the consent of all parties. The record before us establishes no waiver nor consent and obviously the challenged order was not rendered within 90 days after the recommended order was submitted to the agency and mailed to the parties. The violation being clear, our task is to determine its effect. To embark upon a discussion of whether the 90-day period is 'directory' or 'mandatory' is to beg the question. It is apparent that the legislature intended adherence to the 90-day provision. But what is the consequence of violation and upon whom does it fall? It hardly seems appropriate to interpret the rule differently depending upon whether the parties are an agency and a private citizen or whether conflicting interests of multiple private parties are involved. For example, what would be the consequences of a violation of the 90-day rule were the Public Employees Relations Commission to enter an untimely order in a dispute between an employer and a labor union?

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"Our sister court of the Third District in Financial Marketing Group, Inc. v. State, Department of Banking and Finance, Division of Securities, 352 So.2d 524 (Fla. 3rd DCA 1977) addressed the problem but failed to resolve it, saying:

'As to the first alleged error, we agree that the language of the statute is mandatory and the respondent should have rendered its final order within 90 days after the recommended order was submitted by the hearings examiner. The statute does not provide a penalty for violation of this section, and the petitioners urge that the penalty should be that the licenses, as required by the petitioners, should issue. We certainly agree that the State agencies should follow mandates of the Legislature. We further observe that the regulatory agencies should not frustrate a citizen's attempt to secure a license to pursue a vocation or profession by inaction. If there were no other basis to reverse the agency's action under review, we might adopt the penalty suggested by the petitioners and require the issuance of the licenses because of the failure of the respondent to follow the mandatory provisions of Section 120.59, Florida Statutes. * * * ' (352 So.2d at page 525) (Emphasis added)

"While agreeing with our sister court of the Third District in Financial Marketing Group, Inc. v. State, Department of Banking and Finance, Division of Securities, supra, that the 90-day period prescribed by the subject statute is mandatory, we conclude that the effect of its violation should be measured by the provisions of F.S. 120.68(8) and that the consequences of a time violation will depend upon whether the fairness of the proceedings or the correctness of the action taken is found to have been impaired. There may well be instances, as suggested in the

last cited opinion, in which a violation of the 90-day period by an agency may justify reversal of the agency action. * * * " (emphasis added)

The case sub judice presents just such an instance. PERC flagrantly disregarded the time provision in the statute and the rights of the City and its employees to have their status timely determined. Clearly the fairness of the proceedings has been impaired.

Accordingly, while substantially agreeing with PERC on the merits, we nevertheless, for the reasons above given, reverse the order here reviewed and remand with directions that the City's local option ordinance, ordinance number 933, be approved.

The City has requested attorney fees in accordance with F.S. 120.57(1)(b)(9). Although an award of such fees would be justified under the facts of this case (Compare Jess Parrish Memorial Hospital v. Florida Public Employees Relations Commission et al., 364 So.2d 777 (Fla. 1st DCA 1978) in anticipation that PERC will not proceed in accordance with the applicable statutes and the mandate of this case, we exercise our discretion to deny the City's request.

IT IS SO ORDERED.

BLACK, SUSAN H., Associate Judge, concurs.

SMITH, J., dissents.

SMITH, J., dissenting:

I disagree with the court's decision that, in the circumstances of this case, PERC should be required to approve Panama City's local option ordinance in consequence of the delay in issuance of PERC's final order. While PERC's delay was to some extent inexplicable, Panama City does not claim that it was prejudiced in any particular way. I agree with all else Judge Boyer has written for the court, and would approve PERC's findings except in reference to the necessity for a local commission of five members.

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415 So.2d 62
Frank MIGLIORE and Anthony Picarelli, Appellants,
v.
The CITY OF LAUDERHILL, etc., Appellees.
No. 81-1491.
District Court of Appeal of Florida,
Fourth District.
June 2, 1982.
Rehearing Denied July 1, 1982.

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Charles T. Whitelock of Feinstein & Whitelock, Fort Lauderdale, for appellants.

Anthony J. Titone of Titone & Roarke, P. A., Lauderhill, for appellees.

HERSEY, Judge.

Appellants, upon being dismissed from the police department of the City of Lauderhill, filed petitions for writs of mandamus and in the alternative for injunctive relief.

Some familiarity with the facts which occasioned appellants' dismissals is necessary to a resolution of the issues which are presented for our consideration by this appeal.

A convenience store clerk filed written complaints against each of the police officers. After appropriate written notice that an internal investigation had been instituted, appellants, with their attorneys, attended an interview at which they were offered immunity from criminal prosecution in exchange for their testimony concerning the complaints. Each invoked the Fifth Amendment and remained silent.

Subsequently, appellants received written notice to appear at separate times at the office of Internal Affairs. Each attended such a meeting and each was directed by the Chief of Police to submit to a polygraph examination. Each appellant initially indicated a willingness to cooperate but upon being denied the opportunity to confer with an attorney, refused to submit to a polygraph test.

Appellants were then dismissed from the police department and advised of their rights to apply for a hearing before the City's Civil Service Board. Neither appellant applied for a hearing. Rather, appellants sought to have a complaint review board empaneled pursuant to Section 112.532(2), Florida Statutes (1981). Their requests were denied.

The vehicle chosen by appellants to obtain relief (reinstatement and back pay) from the orders of dismissal and to attempt to compel the empanelling of a complaint review board is mandamus. It has long been established that mandamus lies to compel the performance of a specific imperative ministerial duty. It is not an appropriate vehicle for review of a merely erroneous decision nor is it proper to mandate the doing (or undoing) of a discretionary act. Broward County v. Coral Ridge Properties, Inc., 408 So.2d 625 (Fla. 4th DCA 1981). Therefore, of the relief requested by appellants in the trial court, mandamus could apply, if at all, only to obtaining a hearing before the complaint review board.

Section 112.532(2), Florida Statutes (1981), provides:

(2) COMPLAINT REVIEW BOARDS.--A complaint review board shall be composed of three members: One member

selected by the chief administrator of the agency; one member selected by the aggrieved officer; and a third member to be selected by the other two members. Agencies having more than 100 law enforcement officers shall utilize a five-member board with two members beingselected by the administrator, two members being selected by the aggrieved officer, and a fifth member being selected by the other four members. The board members shall be law enforcement officers selected from any state, county, or municipal agency within the county.

However, neither the statute nor any other applicable law explicates the function of the board and there is nothing to indicate that a policeman has a right to have his dismissal reviewed by the board. In fact, the only statutory provision containing a possible explanation of the duties of the complaint review board is Section 112.533, which provides: "Receipt and processing of complaints.--Every agency employing law enforcement officers shall establish and put into operation a system for the receipt, investigation, and determination of complaints received by such employing agency from any person."

The significant language of that section for our present purposes is contained in the final phrase "complaints received by such employing agency ...." We interpret the statute as providing a law enforcement officer with a means of vindicating his actions and his reputation against unjust and unjustifiable claims made against him by persons outside the agency which employs him. We differ in that respect with the First District Court of Appeal which has construed the statute as establishing machinery for providing a forum with due process restraints in which a law enforcement officer may test the validity of his termination from service. West v. State, Department of Criminal Law Enforcement, 371 So.2d 107 (Fla. 1st DCA 1978). Our interpretation is strengthened by the fact that the statute does not itself expressly provide even those minimal due process constraints which would be required if continuation of employment, entitlement to back pay and related rights were to be placed at issue, and thus at jeopardy, by such a hearing. The First District engrafted due process prerequisites on the statute; we decline to do so.

Further, the fact that the board is required to be composed of law enforcement personnel belies the kind of impartiality and lack of bias that are ordinarily requisites of a panel established to determine substantive rights between the body politic (standing in the shoes of the taxpayer) and one of its own whose right to continue to represent and therefor to financially benefit from that body politic has been challenged. We do not mean to suggest that a complaint review board so constituted would necessarily act in a biased manner; only that it gives the impression of impropriety, which the legislature would obviously have avoided at all costs.

Finally, Subsection 112.532(4), Florida Statutes, mandates that the law enforcement officer faced with dismissal or certain other personnel actions shall receive notice together with the reasons for action to be taken against him. It would have been a simple matter, had the legislature intended that a complaint review board be available to the officer under such circumstances, to make reference to Subsection 112.532(2), Florida Statutes, in that regard. The lack of such a reference is but one additional factor that inclines us to the view that Sections 112.533 and 112.532(2) are to be utilized for disposition of complaints made by outside persons and are not intended to provide a forum for any issue other than whether a particular complaint has a basis in fact.

Under our interpretation of the purpose of Section 112.532 et seq., appellants would have been entitled to a hearing on the basis of the original written complaint against them. It is important to note, however, that appellants were discharged not on the basis of that complaint but on the basis of their refusal to obey the order of a superior officer. We are of the view that a complaint review board is not a forum

available to appellants to test the validity of their discharge under those circumstances.

Even if we accepted the contrary view that a complaint review board is the appropriate forum in which appellants' rights should have been determined here we would be required to affirm the trial court's action for several other reasons.

The City of Lauderhill has disbanded its police department. Police protection is provided through the Sheriff's Department by contract between the city and the county. Reinstatement has therefore been rendered impossible by subsequent events. While a hearing might still be available to vindicate the officers' reputations, under appropriate circumstances, their remedy is damages and back pay but not reinstatement. Neither mandamus nor injunctive relief is available to require the performance of a futile act. State ex rel. Walker v. Best, 121 Fla. 304, 163 So. 696 (1935); Smith v. Davis, 22 Fla. 405 (1806). The proposition that requiring a hearing by a complaint review board at this late date would be a futile act is reinforced by our view, taken in an earlier case, that such a board may only recommend a course of action. Its decision is "not adjudicatory but advisory only." City of Hallandale v. Inglima, 346 So.2d 84, 86 (Fla. 4th DCA 1977).

Appellants sought as an alternative to mandamus, injunctive relief, in reliance on Section 112.534. This section operates only to immediately restrain violation of the rights of police officers by compelling performance of the duties imposed by Sections 112.531 to 112.533. Thus, where an officer under investigation is being interrogated without benefit of counsel, the agency may be restrained from violating his right to counsel; if an officer is dismissed without notice, the agency can be compelled to provide the proper notice; and, if an officer is refused review by the complaint review board, under appropriate circumstances, the agency can be compelled to grant such review. We do not view this section as creating a right to injunctive relief in the form of reinstatement after discharge.

Appellants' claims for reinstatement with back pay should have been brought before the appropriate administrative board. Here, a discharged, suspended or demoted employee of the city may appeal to the Civil Service Board for a hearing within fifteen calendar days from the time he was served with notice of the action to be taken. The Board, after an evidentiary hearing, may order reinstatement and back pay. The decision of the Board may be appealed by filing a petition for writ of certiorari with the circuit court. This is, of course, where the doctrine of exhaustion of administrative remedies comes into play. Appellants, having failed to avail themselves of the appropriate administrative remedy, cannot now obtain reinstatement or recover back pay. See Brooks v. School Board of Brevard County, 382 So.2d 422 (Fla. 5th DCA 1980).

Because our conclusions are dispositive of this appeal, we do not address appellants' additional points. We affirm the final judgment denying appellants' alternative petitions for mandamus or injunctive relief.

WALDEN, J., and OWEN, WILLIAM C., Jr., (Retired), Associate Judge, concur.

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516 So.2d 1125
13 Fla. L. Weekly 5

CITY OF MIAMI, a municipal corporation, and Herbert Breslow, Appellants/Cross-Appellees,
v.
Michael M. COSGROVE, Appellee/Cross-Appellant.

No. 86-2015.
District Court of Appeal of Florida,
Third District.
Dec. 22, 1987.

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Morgan, Lewis & Bockius and Peter J. Hurtgen and Jean F. Reed, Miami, for appellants/cross-appellees.

Stinson, Lyons & Schuette and Thomas B. Bourque, Miami, for appellee/cross-appellant.

Before HUBBART, DANIEL S. PEARSON and JORGENSON, JJ.

PER CURIAM.

We conclude that the exclusive remedy for noncompliance with Section 112.532, Florida Statutes (1983), is injunctive relief as provided in Section 112.534, Florida Statutes (1983), and accordingly reverse the money judgment for the appellee, Michael M. Cosgrove.

Section 112.532, Florida Statutes (1983), popularly known as the Policeman's Bill of Rights, gives to law enforcement and correctional officers certain detailed procedural rights and privileges and, pertinent to the present case, provides:

"(4) NOTICE OF DISCIPLINARY ACTION.--No dismissal, demotion, transfer, reassignment, or other personnel action which might result in loss of pay or benefits or which might otherwise be considered a punitive measure shall be taken against any law enforcement officer or correctional officer unless such law enforcement officer or correctional officer is notified of the action and the reason or reasons therefor prior to the effective date of such action.

"(5) RETALIATION FOR EXERCISING RIGHTS.--No law enforcement officer or correctional officer shall be discharged; disciplined; demoted; denied promotion, transfer, or reassignment; or otherwise discriminated against in regard to his employment, or be threatened with any such treatment by reason of his exercise of the rights granted by this part."

When Cosgrove was removed from his non-civil-service position as Assistant Chief of Police without notice or statement of reasons and returned to his permanent civil-service rank of Captain of Police, he sued the appellants for damages only, alleging that they had violated the above subsections. 1

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1 A jury returned a verdict in Cosgrove's favor. On appeal, the appellants contend, inter alia, that relief under the Policeman's Bill of Rights is exclusively injunctive. Because we decide this issue in the appellants' favor, we need not reach any other issues raised by them or any issues raised by Cosgrove in his cross-appeal.

Section 112.534 of the Policeman's Bill of Rights provides as follows:

"Failure to comply.--If any agency employing law enforcement officers or correctional officers fails to comply with the requirements of this part, a law enforcement officer or correctional

officer employed by such agency who is personally injured by such failure to comply may apply directly to the circuit court of the county wherein such employing agency is headquartered and permanently resides for an injunction to restrain and enjoin such violation of the provisions of this part and to compel the performance of the duties imposed by this part."

Section 112.534 is the only remedy provision of Part VI of Chapter 112, and thus the only express remedy provision applicable to alleged breaches of Section 112.532(4) and (5).

Clearly, Section 112.534 provides only for a suit for an injunction, not for an action for damages. The applicable rule of statutory construction is expressio unius est exclusio alterius: where one thing is expressed and others are not, the Legislature is presumed to have intended to omit the items not expressed. This rule of construction is well established, see, e.g., Finkelstein v. North Broward Hospital District, 484 So.2d 1241 (Fla.1986); Thayer v. State, 335 So.2d 815 (Fla.1976); Baeza v. Pan American/National Airlines, Inc., 392 So.2d 920 (Fla. 3d DCA 1980), as is its applicability to a statute which provides one remedy to the exclusion of others. 2 Bachrach v. 1001 Tenants Corp., 21 A.D.2d 662, 249 N.Y.S.2d 855 (1964), aff'd, 15 N.Y.2d 718, 256 N.Y.S.2d 929, 205 N.E.2d 196 (1965) (administrative remedy for alleged religious discrimination was exclusive; no action for compensatory damages would be inferred in absence of legislative intent); see also Gunn v. Robles, 100 Fla. 816, 817, 130 So. 463, 463 (1930) ("Where a particular remedy is conferred by statute, it can be invoked only to the extent and manner prescribed."); Department of Professional Regulation v. Florida Society of Professional Land Surveyors, 475 So.2d 939 (Fla. 1st DCA 1985) (same). The rule is particularly applicable where, as here, the statute being construed creates a new right and prescribes a specific remedy for the enforcement of that right. See State ex rel. Reno v. Barquet, 358 So.2d 230 (Fla. 3d DCA 1978) (state could not sue for damages

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on its behalf under Florida Deceptive and Unfair Trade Practices Law, where statute provided that state could bring action only for declaratory judgment or to enjoin violations); Burland, Reiss, Murphy, & Mosher, Inc. v. Schmidt, 78 Mich.App. 670, 673-74, 261 N.W.2d 540, 542 (1977) (recovery of commission not barred by brokerage agreement's violation of administrative rules because penalties for violation of rule concerned only broker's licensing; "where, as here, a statute or regulation creates a duty unknown to the common law, the remedy provided therein for violation of the duty is exclusive") (footnote omitted).

We thus think that the correct construction of Section 112.534 is that given it by our sister court in Migliore v. City of Lauderhill, 415 So.2d 62 (Fla. 4th DCA 1982), approved, 431 So.2d 986 (Fla.1983), where it was decided that the plaintiff/law enforcement officers were required to bring their claims for reinstatement to the appropriate administrative board and were not entitled to avail themselves of the injunctive remedy of Section 112.534:

"This section operates only to immediately restrain violation of the rights of police officers by compelling performance of the duties imposed by Sections 112.531 to 112.533. Thus, where an officer under investigation is being interrogated without benefit of counsel, the agency may be restrained from violating his right to counsel; if an officer is dismissed without notice, the agency can be compelled to provide the proper notice; and, if an officer is refused review by the complaint review board, under appropriate circumstances, the agency can be compelled to grant such review."

Migliore v. City of Lauderhill, 415 So.2d at 65. Section 112.534, then, is no more than a vehicle for enforcing the procedures established in the preceding sections of this part of the statute; it is not a vehicle for the restoration of substantive rights, whether the restoration is sought by mandamus, injunction, or, as here, an action for damages.

Cosgrove contends, however, that even if no action for damages lies, the appellants' claim in this respect, being raised for the first time on appeal, has been waived. We disagree. While generally we will not consider on appeal an issue not presented to the trial court, an exception exists where the issue for our consideration is one of the trial court's subject matter jurisdiction. See Swebilius v. Florida Construction Industry Licensing Board, 365 So.2d 1069 (Fla. 1st DCA 1979); Pushkin v. Lombard, 279 So.2d 79 (Fla. 3d DCA 1973). The issue in this case--whether the Policeman's Bill of Rights empowers a trial court to entertain an action for damages--is, in our view, an issue concerning the trial court's subject matter jurisdiction--that is, "the power of the court to deal with a class of cases to which the particular case belongs, and ... the power of the court to adjudge as to the general question involved before it." Swebilius v. Florida Construction Industry Licensing Board, 365 So.2d at 1070 (citation omitted); cf. Anderson v. Burwell Motor Co., 73 So.2d 822 (Fla.1954) (since claim for punitive damages was not supported by allegations in complaint, and claimed compensatory damages were for less than jurisdictional amount, circuit court lacked subject matter jurisdiction); Hanley v. Gables Trust Co., 147 Fla. 746, 3 So.2d 725 (1941) (since plaintiff could recover no more than the contract price, and this was less than the jurisdictional amount, circuit court lacked subject matter jurisdiction); Metropolitan Drywall Systems v. Dudley, 472 So.2d 1345 (Fla. 2d DCA 1985) (since only claim remaining was for less than jurisdictional amount, circuit lacked subject matter jurisdiction); Taylor v. Lee Chevrolet, Inc., 376 So.2d 474 (Fla. 1st DCA 1979) (no subject matter jurisdiction in circuit court, since claim for punitive damages was stricken, and remaining allegations did not in good faith support amount claimed); State Farm Mutual Automobile Insurance Co. v. Wallace, 209 So.2d 719 (Fla. 2d DCA 1968) (no subject matter jurisdiction in circuit court, since insurance policy limit was only $500 for each person).

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Cosgrove's other arguments are even less convincing. He argues, first, that because Section 112.534 permits but does not require an aggrieved law enforcement officer to apply for injunctive relief, he therefore may seek damages. The choice provided by the statute, however, is not between injunctive relief and damages, but between injunctive relief and no relief. Lastly, Cosgrove suggests that his suit for damages is authorized by Section 112.532(3), which, as we read it, has nothing whatsoever to do with the employee's rights vis-a-vis his employer but simply memorializes that a policeman shall have the right to sue other persons for damages suffered by the officer in the performance of his official duties. 3

Accordingly, the final judgment under review is reversed as to Counts I, II and V of the complaint upon which Cosgrove recovered, with directions to dismiss with prejudice Counts I and II, and to enter judgment for the appellants on Count V.

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1 Cosgrove's claim focused on the statute alone, and we thus do not address what, if any, remedies may have been available to him under other conceivable but unpleaded theories. See, e.g., Metropolitan Dade County v. Sokolowski, 439 So.2d 932 (Fla. 3d DCA 1983) (action for damages may lie for constitutional procedural due process violations). His claim under Section 25 of the City of Miami Charter, even if such section were otherwise operational, is utterly without merit. See Carter v. Garcia-Pedrosa, 442 So.2d 1022 (Fla. 3d DCA 1983).

2 Where there exists a common law right to sue for damages, and a statute expressly authorizes injunctive relief with no mention of damages, both remedies are available to a plaintiff. Smalley Transportation Co. v. Moed's Transfer Co., 373 So.2d 55 (Fla. 1st DCA 1979). This is so because an existing common law remedy must be expressly extinguished. Peninsular Supply Co. v. C.B. Day Realty of Florida, Inc., 423 So.2d 500 (Fla. 3d DCA 1982) (no implicit

abrogation of equitable lien rights in the enactment of mechanics' lien statute); see Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362 (Fla.1977) (statute designed to change the common law must be clear and unequivocal because the presumption is that no change is intended otherwise); Ellis v. Brown, 77 So.2d 845 (Fla.1955) (statutes are to be construed in reference to the principles of common law, for it is not presumed that the Legislature intended to make any innovation in the common law other than that which is specified); City of Pensacola v. Capital Realty Holding Co., 417 So.2d 687 (Fla. 1st DCA 1982) (same); Sand Key Associates, Ltd. v. Board of Trustees, 458 So.2d 369 (Fla. 2d DCA 1984) (where statute is in derogation of common law, presumption is that no change intended unless explicitly so stated--inference and implication cannot be substituted for clear expression), approved, 512 So.2d 934 (Fla.1987). In the present case, neither before nor after the enactment of Section 112.534, Florida Statutes, was there a right to recover damages.

3 Section 112.532(3) reads:

"(3) CIVIL SUITS BROUGHT BY LAW ENFORCEMENT OFFICERS OR CORRECTIONAL OFFICERS.--Every law enforcement officer or correctional officer shall have the right to bring civil suit against any person, group of persons, or organization or corporation, or the head of such organization or corporation, for damages, either pecuniary or otherwise, suffered during the performance of the officer's official duties or for abridgment of the officer's civil rights arising out of the officer's performance of official duties."

Select Year: 2007 Go

The 2007 Florida Statutes

Title X	Chapter 112	View Entire Chapter
PUBLIC OFFICERS, EMPLOYEES, AND RECORDS	PUBLIC OFFICERS AND EMPLOYEES: GENERAL PROVISIONS	

112.534 Failure to comply; official misconduct.--

(1) If any law enforcement agency or correctional agency fails to comply with the requirements of this part, a law enforcement officer or correctional officer employed by or appointed to such agency who is personally injured by such failure to comply may apply directly to the circuit court of the county wherein such agency is headquartered and permanently resides for an injunction to restrain and enjoin such violation of the provisions of this part and to compel the performance of the duties imposed by this part.

(2) All the provisions of s. 838.022 shall apply to this part.

History.--s. 4, ch. 74-274; s. 35, ch. 77-104; s. 1, ch. 78-291; s. 4, ch. 82-156; s. 4, ch. 93-19; s. 3, ch. 2000-184; s. 8, ch. 2003-158.

Select Year: 2007 Go

The 2007 Florida Statutes

Title X	Chapter 112	View Entire Chapter
PUBLIC OFFICERS, EMPLOYEES, AND RECORDS	PUBLIC OFFICERS AND EMPLOYEES: GENERAL PROVISIONS	

112.532 Law enforcement officers' and correctional officers' rights.--All 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:

(1) RIGHTS OF LAW ENFORCEMENT OFFICERS AND CORRECTIONAL OFFICERS WHILE UNDER 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, such interrogation shall be conducted under the following conditions:

(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, 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 names of all complainants. All identifiable witnesses shall be interviewed, whenever possible, prior to the beginning of the investigative interview of the accused officer. The complaint and all witness statements shall be provided to the officer who is the subject of the complaint prior to the beginning of any investigative interview of that officer. An officer, after being informed of the right to review witness statements, may voluntarily waive the provisions of this paragraph and provide a voluntary statement at any time.

(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 questions.

(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 criminal charges against an officer.

(2) COMPLAINT REVIEW BOARDS.--A complaint review board shall be composed of three members: One member selected by the chief administrator of the agency or unit; one member selected by the aggrieved officer; and a third member to be selected by the other two members. Agencies or units having more than 100 law enforcement officers or correctional officers shall utilize a five-member board, with two members being selected by the administrator, two members being selected by the aggrieved officer, and the fifth member being selected by the other four members. The board members shall be law enforcement officers or correctional officers selected from any state, county, or municipal agency within the county. There shall be a board for law enforcement officers and a board for correctional officers whose members shall be from the same discipline as the aggrieved officer. The provisions of this subsection shall not apply to sheriffs or deputy sheriffs.

(3) CIVIL SUITS BROUGHT BY LAW ENFORCEMENT OFFICERS OR CORRECTIONAL OFFICERS.--Every law enforcement officer or correctional officer shall have the right to bring civil suit against any person, group of persons, or organization or corporation, or the head of such organization or corporation, for damages, either pecuniary or otherwise, suffered during the performance of the officer's official duties, for abridgment of the officer's civil rights arising out of the officer's performance of official duties, or for filing a complaint against the officer which the person knew was false when it was filed. This section does not establish a separate civil action against the officer's employing law enforcement agency for the investigation and processing of a complaint filed under this part.

(4)(a) NOTICE OF DISCIPLINARY ACTION.--No dismissal, demotion, transfer, reassignment, or other

personnel action which might result in loss of pay or benefits or which might otherwise be considered a punitive measure shall be taken against any law enforcement officer or correctional officer unless such law enforcement officer or correctional officer is notified of the action and the reason or reasons therefor prior to the effective date of such action.

(b) Notwithstanding the provisions of s. 112.533(2), whenever a law enforcement officer or correctional officer is subject to disciplinary action consisting of suspension with loss of pay, demotion, or dismissal, the officer shall, upon request, be provided with a complete copy of the investigative report and supporting documents and with the opportunity to address the findings in the report with the employing law enforcement agency prior to the imposition of the disciplinary action consisting of suspension with loss of pay, demotion, or dismissal. The contents of the complaint and investigation shall remain confidential until such time as the employing law enforcement agency makes a final determination whether or not to issue a notice of disciplinary action consisting of suspension with loss of pay, demotion, or dismissal. This paragraph shall not be construed to provide law enforcement officers with a property interest or expectancy of continued employment, employment, or appointment as a law enforcement officer.

(5) RETALIATION FOR EXERCISING RIGHTS.--No law enforcement officer or correctional officer shall be discharged; disciplined; demoted; denied promotion, transfer, or reassignment; or otherwise discriminated against in regard to his or her employment or appointment, or be threatened with any such treatment, by reason of his or her exercise of the rights granted by this part.

(6) LIMITATIONS PERIOD FOR DISCIPLINARY ACTIONS.--

(a) Except as provided in this subsection, no disciplinary action, demotion, or dismissal shall be undertaken by an agency against a law enforcement officer or correctional officer for any act, omission, or other allegation of misconduct if the investigation of such allegation is not completed within 180 days after the date the agency receives notice of the allegation by a person authorized by the agency to initiate an investigation of the misconduct. In the event that the agency determines that disciplinary action is appropriate, it shall complete its investigation and give notice in writing to the law enforcement officer or correctional officer of its intent to proceed with disciplinary action, along with a proposal of the action sought. Such notice to the officer shall be provided within 180 days after the date the agency received notice of the alleged misconduct, except as follows:

1. The running of the limitations period may be tolled for a period specified in a written waiver of the limitation by the law enforcement officer or correctional officer.

2. The running of the limitations period shall be tolled during the time that any criminal investigation or prosecution is pending in connection with the act, omission, or other allegation of misconduct.

3. If the investigation involves an officer who is incapacitated or otherwise unavailable, the running of the limitations period shall be tolled during the period of incapacitation or unavailability.

4. In a multijurisdictional investigation, the limitations period may be extended for a period of time

reasonably necessary to facilitate the coordination of the agencies involved.

5. The running of the limitations period may be tolled for emergencies or natural disasters during the time period wherein the Governor has declared a state of emergency within the jurisdictional boundaries of the concerned agency.

(b) An investigation against a law enforcement officer or correctional officer may be reopened, notwithstanding the limitations period for commencing disciplinary action, demotion, or dismissal, if:

1. Significant new evidence has been discovered that is likely to affect the outcome of the investigation.

2. The evidence could not have reasonably been discovered in the normal course of investigation or the evidence resulted from the predisciplinary response of the officer.

Any disciplinary action resulting from an investigation that is reopened pursuant to this paragraph must be completed within 90 days after the date the investigation is reopened.

History.--s. 2, ch. 74-274; s. 2, ch. 82-156; s. 2, ch. 93-19; s. 721, ch. 95-147; s. 1, ch. 98-249; s. 1, ch. 2000-184; s. 1, ch. 2003-149; s. 3, ch. 2005-100; s. 1, ch. 2007-110.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
REF NO. 07-010513-CI-13
UCN: 522007CA010513XXCICI

PINELLAS LODGE NO. 43, FRATERNAL ORDER OF POLICE and JOHN BRADSHAW,

Petitioners,

vs

HEARING

PINELLAS COUNTY SHERIFF'S OFFICE,

Respondent.
_____/

BEFORE:	THE HONORABLE MARK L. SHAMES Circuit Judge
DATE:	December 14, 2007
TIME:	9:33 a.m.
PLACE:	Pinellas County Judicial Bldg 545 - 1st Avenue North St. Petersburg, Florida
REPORTED BY:	DANIEL J. RUSSETTE, RMR Notary Public State of Florida at Large
PRESENT:	KENNETH J. AFIENKO, ESQUIRE 560 - 1st Avenue North St. Petersburg, Florida Attorney for Petitioners
	SHANNON KENNEDY, ESQUIRE JAIME EAGAN, ESQUIRE Pinellas County Sheriff's Office 10750 Ulmerton Road Largo, Florida Attorneys for Respondent

ORIGINAL

Pages 1 through 24

MS. KENNEDY: Here are copies of the cases cited. We're here today on the Respondent's Motion to Dismiss. Basically the petitioners filed this cause under Section 112.534, which is also known as the Police Officers Bill of Rights. Petitioners also filed another suit with the Civil Service Board that's not at issue here today, but basically both suits contain the allegations of wrongdoing on the part of the Sheriff or his employees for an internal affairs investigation with regard to a deputy.

The petitioners in this action are both the FOP and Deputy Bradshaw. We spoke prior to the hearing, and I believe that petitioners have agreed that the FOP does not have standing in this lawsuit. I'll direct just the arguments towards the relief requested, and we believe that that relief is not a remedy available under the Police Officers Bill of Rights, and even if it was available, it's an injunction, and you can't undue what's already been imposed.

The Civil Service Board in the other pending civil suit, we believe that that's a proper place for these, for the relief that the petitioner seeks, if it is true, in fact, that the allegations are as the petitioner sets forth. But, of course, there is

ongoing litigation in that and depos set.

So basically with respect to the Police Officers Bill of Rights, what the Bill of Rights sets forth is rights of police officers in internal affairs investigations, how an interrogation shall take place, where it is, what they need to be informed of, reasonable time periods. They just set forth all these rights that the Sheriff's Office must follow in order to impose a discipline.

In this case the I.A. investigation took place and the allegation is that it did not take place within 180 days, which is one of the things in the Police Officers Bill of Rights. The deputy was given notice of the results of the investigation and was made aware of a four day suspension. The deputy then served the four day suspension and then this suit came.

Basically the Police Officers Bill of Rights, because it's a statutory right that was granted to the deputies, it also limits its remedy to an injunction. And that injunctive relief is to compel the police, the Sheriff's Office, to follow these rights that are set forth. And all the case law that is cited in the memorandum of law stands for that. If they aren't told within a reasonable time then you file an

injunction to prohibit that interview from taking place until they are informed of the reasonable -- the things that are involved in the rights.

Once the punishment is imposed, the Police Officers Bill of Rights, which sets forth how the investigation should be conducted, that's then finished and the remedy becomes like they filed, with the Civil Service Board. Basically in the pleading it states that the injunction that they are requesting of this court is to rescind the discipline previously imposed. Basically with any type of injunctive relief there are certain things that are common to all injunctions, and by its very nature injunctions will only lie to restrain the commission of a future injury. Since it's impossible to prevent what's already occurred.

You can't prohibit an act which has already been committed. If something already happened, then you can't enjoin what's already been done, but then you would sue for, you know, back pay through this other avenue.

There are two cases that we feel are directly on point. One is Migliore versus the City of Lauderhill. In that case the Fourth DCA, which was then reviewed by the Supreme Court and the opinion adopted,

basically sets forth that exact issue. They asked whether a policeman's bill of rights empowers the trial court to entertain an action for damages, and the answer is no. That the only thing that the policeman's bill of rights does is compel an agency to do the things that are within the rights that they are entitled. If the remedy is damages and back pay, then these cases basically stand for the fact that the appellant's claims for reinstatement with back pay should have been brought before the appropriate administrative board.

THE COURT: Let me interrupt you and ask you a question. What's the difference between -- your argument suggests that this action for injunction ought to be dismissed and the petitioner should pursue his remedies, either administratively, which I understand are going on, or sue for damages for whatever, right?

MS. KENNEDY: Yes, sir.

THE COURT: Okay. Suppose he sues for damages, and as part of the relief, requested he seeks the pay for the four days, which is a pure damages issue, but asks for removal of the suspension from his personnel record. What would be the difference between that and what he's seeking to do now from the standpoint of

relief of damages?

MS. KENNEDY: The Police Officers Bill of Rights was created by statute and it was specifically limited in a remedy to injunctive relief, and it has been specifically interpreted to be restrictive to that, to compel the performance of the duties set forth. And then when it was reviewed by the Supreme Court basically by the statutory construction by creating these rights, they've limited the remedy that you can seek. And unlike the Civil Service Board, which they have also their own rules and remedies that you can seek in that under that lawsuit, but this one, under Section 112.532, when it was created by the legislature and these rights were granted to police officers, this particular statute in which the petitioner has brought his suit in this particular forum is limited only to injunctive relief to compel the Sheriff's Office to follow these rights.

THE COURT: Well, let me ask a question a different way then. Suppose we get down the road and there is a suit for damages and a request to remove the derogatory action from his record, is there going to be an argument from the respondent that that's injunctive relief and isn't available? The only way that would have been available would be under the

Police Bill of Rights which -- do you understand what I'm saying? I'm trying to see a couple steps down the road here and see how this is going to play out if you say the policeman's bill of rights, the statute limits relief to injunctions --

MS. KENNEDY: Yes, sir.

THE COURT: -- and injunctions can't be entertained for past acts.

MS. KENNEDY: Yes, sir.

THE COURT: Then when we get to the point we're talking about past acts and trying to remedy what was done, is the respondent going to make the argument that too late, should have done that with an injunction action?

MS. KENNEDY: I understand, Judge. What the specific allegation here is is that the suspension was not imposed within the 180 day timeframe. What should have happened in my opinion is that at the expiration of the 180 days the injunction or the relief requested should have been that no further investigation take place. In this case that wasn't done. So they followed through to the whole thing.

So what happens is in this case all of these rights, whether they were followed, as is our allegation, or not followed, as is their allegation,

we are now past that. So there is no way to undo what's already been done. So the remedy becomes to remove something from the court would be -- or to remove something from his file on a court order would be a remedy that's not enjoining a future act, that would be correcting a past act, which, in our opinion, should go under the Civil Service Board, because under Section 112.532, why they specifically -- the idea is you need to follow these rules, and if they are not following the rules, go to court, because there are many adverse repercussions if these deputies, you know, don't cooperate with A.I., including potential termination.

So what happens is they are supposed to come into court instead of going up, and as in this case, telling them I'm not going to give a statement, you should come into court and get an injunction with them proceeding with the interrogation or proceeding with the investigation after 180 day, but the petitioner chose not to do that in this case. He chose to wait until after the imposition -- the punishment was not only imposed, but served, and then files it. So now his exclusive remedy in our opinion is under the Civil Service Board because of the timing of when he filed.

THE COURT: Okay. So I guess your argument is

that there is no way to amend this complaint, even to turn it into an action for some violation of his employment rights, that the exclusive remedy is the Civil Service Board?

MS. KENNEDY: That is my opinion, yes, sir.

THE COURT: And whatever appellate rights or court proceedings might follow statutorily after a determination by the Civil Service Board?

MS. KENNEDY: Yes, sir. And, more succinctly, the remedy is no longer available under 112.532 because it is limited to an injunction, and you can't wait until everything is already done and then request an injunction. Because you can't enjoin something that's already happened.

THE COURT: Okay. I think I understand your argument. Let me hear from Mr. Afienko, then I'll come back to give you the final argument. And let me, first thing, Mr. Afienko, confirm that you're agreeing that dismissal is proper as to the FOP on the standing issue?

MR. AFIENKO: Yes, sir.

THE COURT: Okay. Are we going to do that by stipulation to drop the proceeding against the FOP or by my granting the motion to dismiss without objection? I'm just -- procedurally I want to make

sure I understand what you've talked about and how it impacts me. Are you just stipulating that the respondent -- or the petitioner, FOP, is being dropped as a party?

MR. AFIENKO: Yes, sir.

THE COURT: Ms. Kennedy, work for you?

MS. KENNEDY: Yes, sir.

MR. AFIENKO: Okay.

THE COURT: Then if you want me to sign an order on that stipulation.

MR. AFIENKO: Judge, here is the respective statutes. And here is the problem that we have with this. I'll be the first one to admit it's a poorly worded statute. The 180 day rule came into effect last year, it was written by Rod Smith, the person who ran for governor. He represents a lot of law enforcement officers out of the Gainesville area. We've had conversations about this, actually, about this issue, because this is some of the events I've had to encounter.

First of all, Judge, even in respondent's own cases, first of all, damages are absolutely prohibited in a bill of rights injunction case. And that's in the case that they've cited. And that's the Cosgrove case. There is no remedy for damages whatsoever in a

bill of rights violation case. The exclusive, and one and only remedy, Your Honor, is an injunction.

The problem is half the time we don't know that our rights are being violated until they've already been violated. And in this specific instance, Your Honor, I think some of the key elements that Your Honor needs to be aware of, this incident that ultimately led to the suspension happened in September of 2006. This case went until May of 2007, which was well over six months before they even instituted an internal affairs investigation against my client. That was already past, the 180 days.

Here is the problem that we have with this. When we go in and answer the investigation they give us a brief synopsis as to what my client's been charged with. They didn't go into any of the factual details, other than misuse of department, agency equipment or vehicles, et cetera. We go in on -- forgive me for the exact dates with that. August 10th, Your Honor, we go in for the actual interview, which is almost a year later. I voiced my objection, and that's part of -- I think you have my memorandum of law there.

THE COURT: I read that. I read that.

MR. AFIENKO: We went in there and we expressed our concern with the possible 180 day rule violation.

The problem is they threatened us with the possibility of termination unless we speak at that particular time. That's on record in the actual transcript that was provided to the court in my memorandum.

THE COURT: Well, let me ask you a question about that.

MR. AFIENKO: Sure.

THE COURT: Actually, I have a couple questions. But let me respond immediately to that immediate past statement. If they threatened your client with dismissal for failing to answer the question --

MR. AFIENKO: Yes, sir.

THE COURT: -- isn't that the point at which you file your action seeking injunctive relief? Seeking them -- or seeking relief that the court prohibit them from firing your client, number one, ordering him to answer questions because they violated the 180 day rule? I mean isn't that what that statute contemplates and the way the statute contemplates you deal with that thing, rather than saying, well, okay, we'll succumb to this allegedly improper action by the agency but then we're going to seek an injunction afterwards? Isn't that your problem?

MR. AFIENKO: That's one of my problems, Your Honor. This case, even if they were to sustain him,

did not rise to the level of termination. I wasn't afraid of what was going to happen in that, per se. I was afraid with if you don't answer the questions, you're subject to termination. I was afraid of that.

However, here is the other hurdle, I guess, that I have to face. If you look in the statute, 112.534, it states personally injured. The person must be personally injured. And to read that, Your Honor, they are not personally injured until something negative happens as a result of the action. Here, nothing happened. They basically, without any jurisdiction, we were hoping that they would see that my client didn't do anything wrong and just let the case go away. But they weren't -- my client wasn't personally injured until the day he received his four days off, which was far beyond the 180 days.

So at that point in time I'm between a rock and a hard place. I mean I'm limited to an injunction, but here is what I'm asking the court, and I guess rescind is probably a poor choice of words. What I'm asking the court to do is maybe abate his disciplinary and comply with the statute.

THE COURT: How do you abate something that's already occurred?

MR. AFIENKO: Judge, this is a case of first

impression. I wish I could answer it for you. I don't know. Mandamus, perhaps, is an alternative.

THE COURT: Well, do I have that authority under this statute?

MR. AFIENKO: And that's the problem. It says I can't get a mandamus. I don't know what to do.

THE COURT: Is your interpretation -- what is your interpretation of when the 180 days started?

MR. AFIENKO: Okay. We just had this battle in front of Judge Logan on a different set of facts. And he interpreted the 180 days is when they knew or should have known of a possible internal affairs investigation. And that's documented in my petition. A lieutenant who did work for internal affairs determined back in September, after the crash happened, that my client in his opinion violated Department policy. But they sat on the case for seven months and didn't do anything. Then all of a sudden -- and, Judge, it's not in my petition, but the timing of this was very suspect because the civil suit was pursued at some point in time. And that's when the internal affairs investigation popped up, and that's what gave me concern about the entire thing. They knew it back in September but they didn't do anything.

THE COURT: Well, can you raise any of this in the Board proceedings?

MR. AFIENKO: Here is my other problem. And, Judge, you hit it right on the head. I mean my fear is I've never argued the 180 day rule in front of the Civil Service Board. They could look at me and go, Mr. Afienko, you know this isn't proper for the Civil Service Board because your exclusive remedy is an injunction. I put it in my Civil Service Board because I wasn't going to waive that as a defense, but if they denied to hear that, then I'm totally barred. And, Judge, there is no place to turn, Judge.

And I still submit to the court that half the time these cases, we don't even know our rights have been violated until well after the violation. Not in this particular case so much. But they were without jurisdiction to even investigate it, but because of that, we're here today trying to fight and say, okay, our exclusive remedy is an injunction.

How does this injunction apply? The cases which have been cited speak to that. They can't undo something that's already occurred. But that's for an act that keeps occurring that has damages associated with continuing that. I'm not asking that. I'm asking the court to say you need to comply with that

statute, and here is an injunction that forces you to comply with that statute, and whatever defense they have of that, the 180 day rule, is waived for some certain reason. I mean that might be something they may want to argue. But I don't think legitimately they can come in eight months later, put my client under internal affairs investigation and hide behind my exclusive remedy of an injunction, but yet I can do it on a civil service appeal and expect it to be a statute of validity. It's the bill of rights, Your Honor. This is the only thing that they have.

THE COURT: Well, here is -- I understand your problem, your client's problem, I'm sympathetic, under the facts as you outlined them. And, again, those are allegations, and your issue of whether there is something suspect about the timing of the internal affairs proceeding in relation to the civil action filed against the sheriff, I gather, I understand that, and I'm sympathetic to your client's position, but we're talking about a statute here that I have to, as a matter of law, give strict construction.

And I think you hit it on the head at the start of your remarks. I think your argument, or I think your best course of action is to address it to Rod Smith or his compatriots in the legislature if this is

a defect in the legislation in terms of not covering situations that might arise or you suggest in this case have arisen, so be it, but I don't know that it's a judicial matter for me to take into consideration and change or significantly expand the construction of the statute related problems. From your standpoint, again, I understand you made a decision that I wouldn't fault in terms of -- I wouldn't second guess in terms of you were there, you were under the gun, you had a choice to make, you considered the options, you considered the risks and the benefits and you made the decision to have him go ahead and testify to avoid discharge. But it seems to me that had the decision been made to risk that and not answer the questions because you felt it was a violation of the bill of rights, then clearly under the bill of rights that would have been the point at which you filed the action for an injunction. Before they imposed any discipline, before they discharged him for not answering the questions, and I don't think we'd be here on the issue of whether or not the Police Officers Bill of Rights applies to this situation.

But, again, having made that decision, the discipline having been imposed, the discipline having been served, at this point I can't reasonably

interpret this statute to give me the authority to do what you want me to do, which is to enjoin something that they've already done. I think that the proper remedy for you at this point, my first thought was amending this action to seek some kind of damages, but if in fact -- and I don't know as much about the law applicable to that specifically as you both do, but my sense is, just from listening to the arguments, that it may be in fact limited to pursuing administrative remedies, including the Civil Service proceedings, to make your arguments, and then pursuing whatever judicial review process might be involved there.

But I can't accept the argument that the Civil Service Board might not honor your claim of the violation of 180 days. It doesn't change the fact that I don't have the authority to do it here in this proceeding. I think at some point that ought to be a valid defense or argument that you should make. And I can't say where and I can't say if it will work for you, but I can say with some degree of certainty that I don't think this proceeding is appropriate under the statute as I interpret the statute as written.

MR. AFIENKO: And just for my clarification, Your Honor, is that because it's an injunction, an injunction only works to do prospective violations,

not something that occurred prior? Is that the --

THE COURT: Well, that's a big part of it.

MR. AFIENKO: Okay.

THE COURT: And you're telling me the statute doesn't provide for damages, so the fact that we're after the fact seems to end any application of the Police Officers Bill of Rights here.

MR. AFIENKO: May I just ask the court then, I mean, just for me because this is all new to everybody with this 180 day rule stuff. I can't get an injunction until I'm personally injured. How does that -- I mean I'm not injured until a disciplinary action happens as a result of that.

THE COURT: Well, has there been any interpretation of that to suggest that the threat of being fired isn't a personal injury? I mean the personally injured, just in terms of English, seems to suggest actual physical personal injury that we might have, you know, in the context of an impact, for instance. I think clearly in the context of this statute that's not what it's talking about. I think it talks about some kind of harm to an individual, such as the threat of being fired if they don't answer questions at an internal affairs proceeding. So I don't know if that answers your question, but it seems

to me that if no court has yet ruled on that issue, that seems to be the way that should go. But I don't see that as my issue today.

MR. AFIENKO: Okay. Let me just ask one more question, if the court would be so, to entertain that. And these are becoming more and more prevalent with the additions to some of the statute of the bill of rights. In some cases, not this one, perhaps, but in some cases the officer doesn't know that their rights have been violated until after the statements have been given. In that situation, I mean, just so I know, how would the court interpret that particular scenario?

THE COURT: I think that's -- I'm saying I think that's a legislative issue. I think if that's -- I'm not going to give an advisory opinion on this circumstance beyond what I've said. But it seems to me if that's an issue, that whatever influence your client or the FOP has with the legislature ought to be used to address problems, defects in the statute using the situation you're talking about as an example. But, again, I don't think I have the authority to address that in the context of this matter. If I thought it was judicial, I'd address it. I don't think it is at this stage.

MR. AFIENKO: Okay.

THE COURT: Ms. Kennedy, I'm going to grant the Motion to Dismiss. I'd like you to prepare an order, make sure Mr. Afienko sees it before it comes to me, that, number one, upon stipulation of counsel the FOP is dismissed as a petitioner for lack of standing. And that based on the statute the court is without statutory authority to grant the relief requested in the petition and it's dismissed. Now, the only remaining issue is is there any reason to give you leave to amend? Do you contemplate there is anything here that you can do based on what we've talked about that because I think -- I don't think the statute helps you. If there is something else that you could do in the litigation, I'll hear it, but it sounds to me like another basis for the decision is that the statute doesn't apply and the relief sought by the petitioner needs to be sought administratively, including the Civil Service Board. But is there anything I'm missing or anything that -- you two want to talk about that and figure it out? I'm not inclined to make it with prejudice if there is something that I haven't heard and ought to consider or that you might think of after you leave here that might well give you another bite at the apple.

MS. KENNEDY: Judge, our position is that since it's injunctive relief, limited solely under the statute, and it's clear, and since everything has already been done, it is our position there would be no way to seek relief under this statute based on the timing of when the petition was filed.

THE COURT: Well, I agree with that. But what I guess I'm not artfully saying is if there is something other than the statute that might leave a flicker of jurisdiction here for the petitioner. I don't sense that there is, but I just don't want to enter a reversible order because I didn't have enough information or because -- I contemplated it will be with prejudice if it relates to the statute alone. If you come up with something else that you think changes that or you should have leave to address in this proceeding, I want you to bounce it off Ms. Kennedy. If you don't agree, bring back that issue to me as to with or without prejudice and I'll consider it. But absent that let's make it with prejudice, and that sets up your appellate review rights too --

MR. AFIENKO: Yes, sir.

THE COURT: -- in the final order.

MR. AFIENKO: Here is my only concern too, being there is an administrative hearing pending. Is that

going to be something that is going to have an effect on my administrative remedies, or is that going to be separate, apart from whatever the administrative courts do?

THE COURT: That's outside my purview, isn't it?

MS. KENNEDY: That's our position. It's a different case number, a different tribunal, a different --

THE COURT: I don't know that that's my issue at this point.

MR. AFIENKO: Okay.

THE COURT: Okay?

MS. KENNEDY: Thank you, Judge. And thank you for hearing it.

(HEARING CONCLUDED AT 10:05 a.m.)

STATE OF FLORIDA)

COUNTY OF PINELLAS)

I, Daniel J. Russette, Registered Merit Reporter certify that I was authorized to and did stenographically report the hearing; and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 17 day of December, 2007.

Daniel J. Russette, RMR

PINELLAS COUNTY SHERIFF'S OFFICE
ADMINISTRATIVE INVESTIGATIONS
AI 07-027

IN RE:
DEPUTY JOHN BRADSHAW 55578
---/

DATE: June 19, 2007

TIME: 4:07 p.m. - 4:38 p.m.

PLACE: Pinellas County Sheriff's Office
AID Interview Room
10750 Ulmerton Road
Largo, Florida

PRESENT: SERGEANT JOE GILLETTE
CORPORAL LISA O'MARA

REPORTED BY: KayLynn Boyer
Court Reporter
Notary Public
State of Florida at large

SWORN STATEMENT OF:
DEPUTY JOHN BRADSHAW

PAGES 1 - 27

MORGAN J. MOREY & ASSOCIATES COURT REPORTING
501 South Fort Harrison Avenue, Suite 201
Clearwater, Florida 33756
(727) 894-7407

PROCEEDINGS

SERGEANT GILLETTE: The date is June 19th, 2007. The time is 4:07 p.m. This is Sergeant Joe Gillette of the Pinellas County Sheriff's Office Inspections Bureau. Present with me is Corporal Lisa O'Mara, also of the Inspections Bureau. We are in the interview room at A.I.D. at the Sheriff's Office. Also present with us is KayLynn Boyer, a court reporter.

At this time would you please state your name, rank or position for the record and for the purpose of voice identification.

A. Deputy John Robert Bradshaw, Pinellas County Sheriff's Office.

SERGEANT GILLETTE: This is an official Department investigation. It is my duty to inform you that you are required to answer questions directed to you during this interview truthfully and to the best of your knowledge. I further wish to advise you that if you refuse to testify or answer questions relating to this investigation you will be subject to Department charges which could result in your dismissal from the Pinellas County Sheriff's Office.

Also, should you engage in lying, untruthfulness, misstatement, or should you omit to respond to any questions asked you fully and truthfully

you can be prosecuted for perjury, false statement or obstruction of justice.

You have the right to be represented by counsel or any other representative of your choice who may be present with you at all times during this investigation. Also present with you is?

MR. AFIENKO: Ken Afienko.

SERGEANT GILLETTE: You are present as the subject of an administrative investigation by the Pinellas County Sheriff's Office. As such, you have been provided a copy of the Garrity Warning to read and sign prior to this interview. Do you have any questions concerning your rights as stated in the Garrity Warning?

A. No, sir.

SERGEANT GILLETTE: Okay. The allegations against you are as follows: It is alleged that on September 22nd, 2006, you violated General Order 3-1.1, Rule and Regulation 5.4, which is duties and responsibilities. And 5.5, Obedience to Laws and Ordinances, to wit, while engaged in a pursuit you violated General Order 15-1, Assignment and Use of Sheriff's Office Motor Vehicle; 15-2 two, Pursuit Operation of a Sheriff's Office Vehicle; and 15-4, Operation of a Sheriff's Office Vehicle.

The court reporter will be placing you under

oath. After you have been placed under oath we will be taking sworn testimony from you about this case. Having that mind will the court reporter now place the subject under oath.

THEREUPON,

JOHN BRADSHAW

Was adduced as a witness herein, and, after first being duly sworn on oath, was examined and testified as follows:

EXAMINATION

BY SERGEANT GILLETTE:

Q. Good afternoon, Deputy Bradshaw.

A. Good afternoon sir.

SERGEANT GILLETTE: And Mr. Afienko, did you have something that you wanted to introduce for the record?

MR. AFIENKO: Yes. Pursuant to Florida Statute 112.532, Subsection 6a, regarding the limitations for disciplinary actions; this crash happened in September of '06, and the information gleaned to be under that investigation seemed to have been brought to the attention of Lieutenant Pelella in December, December 13, 2006, to be exact, and that's beyond 180 days. And I'm instructing my client, Deputy Bradshaw, that that case is beyond the scope of jurisdiction to investigate it and

not to answer any questions.

SERGEANT GILLETTE: Okay. In light of the fact that you're going to seek an injunction concerning this issue, are you now recommending that your client answer your questions?

MR. AFIENKO: Under the threat of allegations concerning the Garrity Warning that you read on record, that he's subject to disciplinary sanctions, under those auspices and under those conditions we will give an interview only under the condition that he's threatened with further disciplinary action.

SERGEANT GILLETTE: That would be the case.

MR. AFIENKO: Yes. Under those conditions we will give the statement under protest.

SERGEANT GILLETTE: All right. Then with that in mind we'll go ahead and initiate the interview.

EXAMINATION

BY SERGEANT GILLETTE:

Q. Deputy Bradshaw, what is your current assignment?

A. Currently in Patrol Operations, evening shift, currently assigned to the field training squad, south county.

Q. And how long have you been a deputy sheriff?

A. Approximately six and a half years.

Q. Any prior experience in law enforcement?

A. No, sir.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

CIRCUIT CIVIL NO. 07-010513 CI-13
UCN 52-2007-CA-010513-XXCICI

PINELLAS LODGE NO. 43,
FRATERNAL ORDER OF POLICE
and JOHN BRADSHAW,

Petitioners,

v.

PINELLAS COUNTY SHERIFF'S
OFFICE,

Respondent.
_____/

ORDER GRANTING RESPONDENT'S MOTION TO DISIMISS WITH PREJUDICE

This cause, having come before this Court on December 14, 2007 and the Court having heard argument from counsel for the Petitioner and counsel for the Respondent, the Court finds as follows:

1. Upon stipulation of counsel Fraternal Order of Police is dismissed as a Petitioner in this action for lack of standing.

2. Section 112.534 Florida Statutes, prescribes an injunction as the sole remedy for violations of the Act. Petitioner's relief requests this Court issue an injunction to rescind punishment that he has already served. Since an injunction can only be applied prospectively and not retrospectively, this Court is without authority to grant the relief requested. *See Quadomain*

Condominium Ass'n, Inc. v. Pomerantz, 341 So.2d 1041, 1042 (Fla. 4th DCA 1977); *City of Coral Springs v. Florida Nat'l Properties*, 340 So.2d 1274, 1272 (Fla. 4th DCA 1976).

WHEREFORE, Respondent's Motion to Dismiss the Petition is granted with prejudice.

Dated this _____ day of January, 2008.

TRUE COPY
Original Signed
JAN 16 2008

MARK I. SHAMES
Circuit Judge

Honorable Mark I. Shames
Circuit Court Judge