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MEMORANDUM

TO: Council Member Katrina Brown

FROM: Stephen J. Powell, Esq. 

CC: Jason Gabriel, General Counsel
Margaret M. Sidman, Managing Deputy General Counsel

Re: Allowable Review of Police Conduct by Citizen Review Bodies

Date: November 29, 2016

I. INTRODUCTION

In response to a request from Council Member Katrina Brown, the Office of General Counsel has examined the options available to City Council under Florida law to establish a citizen review body (CRB) to review the performance of the Jacksonville Sheriff's Office ("JSO") and its officers.

II. QUESTIONS ASKED

1. Whether the City Council may, by ordinance alone, create a Citizen Review Body ("CRB") for the purpose of reviewing police officer conduct?
2. What laws restrict the creation of the CRB established by ordinance alone?

III. SHORT ANSWER

1. City Council cannot establish a CRB to perform certain duties expressly reserved to the Sheriff by law. Thus, a CRB may not operate in conflict with §§ 112.532-112.533, Florida Statutes (2016), by performing the initial review or assessment of police conduct that may result in officer discipline, nor may a CRB interfere with the Charter-granted executive powers of the Sheriff to (1) operate the Sheriff's Office and (2) control all aspects

of litigation and potential litigation against the Sheriff's Office. The Sheriff has designated the Internal Affairs Unit within JSO to perform all investigations of complaints regarding officer conduct. Therefore, City Council may not establish a body to investigate simultaneously with JSO Internal Affairs.

2. Whether the Council may by ordinance alone create a CRB depends on (1) the structure of the CRB, (2) the timing of the CRB activities, and (3) the role the Council seeks to give to the body.

IV. DISCUSSION

a. CITIZEN REVIEW BODIES MAY NOT OPERATE IN CONFLICT WITH §§ 112.532-112.533, FLORIDA STATUTES

LEOBOR – The Law Enforcement Officer Bill of Rights ("LEOBOR"), "codified at Fla. Stat. §§ 112.531–112.535, sets forth the *exclusive procedures* to be followed by law enforcement and correctional agencies for investigation of complaints filed against law enforcement and correctional officers." *Adamson-James v. Florida Dep't of Corr.*, No. 6:11-CV-628-ORL-36, 2013 WL 1968499, at *8 (M.D. Fla. May 13, 2013) (emphasis added). Section 112.533(1)(a), Florida Statutes (2016), states, in relevant part:

Every law enforcement agency...shall establish and put into operation a system for the receipt, investigation, and determination of complaints received by such agency from any person which shall be *the procedure* for investigating a complaint against a law enforcement and correctional officer *and* for determining whether to proceed with disciplinary action or to file disciplinary charges, *notwithstanding any other law or ordinance to the contrary.*

(emphasis added).

LEOBOR Procedures and Requirements – Section 112.533 requires that any local government agency receiving or initiating a complaint against an officer relay the complaint to the employing agency within five (5) days of receipt. Additionally, LEOBOR mandates that the complaint and *any information collected in the course of the investigation* are confidential, except to the officer in question, until the investigation ceases to be active (as long as it is continuing with a reasonable, good faith anticipation that an administrative finding will be made in the foreseeable future) or until the agency head (in Jacksonville's case, the Sheriff) informs the officer in question that the investigation is concluded either with a finding not to proceed with disciplinary action or to file charges or a finding to proceed with disciplinary action or to file charges. F.S., s. 112.533(2)(a). *And see*, F.S. s. 112.532(4)(b) which provides that the "contents of [any] complaint *and investigation*" against a law enforcement or corrections officer "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." (Emphasis added). This confidentiality requirement is so important that the Legislature adopted an exemption to the public records law for information obtained during an investigation by the employing agency. F.S., s. 119.07(1).

LEOBOR and Exclusive Jurisdiction – LEOBOR establishes that when a complaint against a law enforcement officer is received, the employing agency of the law enforcement officer is the “only local government entity authorized to investigate the complaint.”¹ *Demings v. Orange County Citizens Review Board*, 15 So. 3d 604, 608 (Fla. 5th DCA 2009). The First District, in *FOP v. Rutherford*, 51 So.3d 485 (Fla. 1st DCA 2011), extended the protections of the LEOBOR to any police agency investigation that may result in officer discipline, regardless of whether the investigation was prompted by a “complaint” against an officer or regarding an officer’s conduct. *Demings* and *FOP* support the conclusion that the LEOBOR sets forth the exclusive procedures for investigation of police officer conduct that may lead to discipline.

Charter powers – Section 8.01 of the Charter, which creates the Office of the Sheriff² and defines the duties of the Sheriff, supports the conclusion that the Sheriff has exclusive power over the investigation of any non-criminal wrongdoing by or complaint about any officer. Section 8.01 states: “The sheriff shall be responsible for the performance of duties imposed upon the sheriff of Duval County by the Constitution or by the general or special laws of Florida and shall be responsible for the management, operation, and control of law enforcement and traffic safety in the consolidated government.” By this, Section 8.01 guarantees the independence of the Sheriff in regard to the hiring and firing of personnel, in a manner similar to the independence established in Section 30.53, Florida Statutes.³ Accordingly, under the Jacksonville Charter, the office of the Sheriff remains intact as to the Sheriff’s operational authority. GC Op. 68-114.

This operational authority comports with the Charter strict separation of powers requirement. Article 4, Charter. The Sheriff’s operational authority also grants to the Sheriff the executive authority to control litigation against the Sheriff’s Office. Consequently, the Sheriff could exercise authority over officers in order to assure that a CRB did not interfere with the Sheriff’s decisions as to how to prepare for potential litigation.

Summary – It necessarily follows that the Sheriff’s responsibility in the area of officer discipline may not be usurped by ordinance alone or delegated by the Sheriff to persons outside the Sheriff’s Office. Cf. GC Opinion 94-2, recognizing the authority of the Sheriff to delegate some powers to the Undersheriff. The Sheriff has established the Internal Affairs Unit (“IAU”) within JSO as the local government procedure for investigating complaints against officers that could lead to disciplinary action. In addition, in regard to certain incidents involving the “use of force,” the Sheriff has established a Response to Resistance Review Board to review officer-involved force incidents and make recommendations for further action including referral to Internal Affairs for further investigation. Thus, no other local body lawfully may be authorized to conduct any investigation of officer conduct that could result in discipline while any JSO investigation remains active.

¹ This presumes, of course, that the complaint is not criminal in nature. Should a complaint be about alleged criminal conduct, several other law enforcement agencies have the ability to investigate and prosecute including the State Attorney’s Office, the Florida Department of Law Enforcement, the U.S. Attorney’s Office, and the United States Department of Justice.

² See, GC Opinions 68-114 and 03-01.

³ This independence does not exempt the Sheriff from other requirements of the Charter or state statutes, e.g., duly enacted civil service and collective bargaining laws.

D'Agastino v. City of Miami, 189 So. 3d 236, 241 (Fla. 3rd DCA 2016), does not lead to a different conclusion. While the Third District concluded that LEOBOR “does not preclude the formation of an independent and external citizens review panel . . . to investigate alleged police misconduct and make proposed recommendations,” it did not conclude that any such citizen review panel could interfere with an on-going investigation. Nor did the Third District consider separation of powers issues related to the City of Miami charter.

b. FEASIBLE OPTIONS FOR A CITIZEN REVIEW BODY FOR JACKSONVILLE

Concluded IAD and other closed investigations that implicate officer discipline may be reviewed by a CRB established by Council. A CRB may also be authorized to review the overall performance of the JSO and make recommendations for change. There are three common forms of CRBs. In some places, a combination of the following types of bodies is used to review complaints and other police conduct:

The disciplinary-recommendation model. Here the CRB is charged with investigating specific allegations of officer abuse and making findings to be submitted to the Sheriff. This class of review body is composed completely of non-sworn citizens, and may include investigators who investigate qualifying incidents. Investigative reports are made and reviewed by the non-sworn personnel, who then make recommendations to the Sheriff. These types of boards may be the most expensive, primarily because private investigators would likely be utilized to offset the lack of expertise of the lay citizens comprising the citizen review body. Consistent with LEOBOR and the Charter, this model or variation would only be permitted if selected by the Sheriff.

The legislative-investigative audit model. Here the CRB acts in a capacity to assist the City Council in light of its legislative powers. With this model the CRB may review and assess findings of the Sheriff's investigative processes or, perhaps, audit the Sheriff's internal review process to ensure its fairness. This type of board would be created by ordinance and could address all complaints of police conduct or just specific types/instances of police action (*e.g.*, officer-involved shootings). This model must focus on making recommendations to the City Council for consideration of appropriate legislation.

This form of citizen review appears to be the most common nationally and most likely to be legal in Florida due to the limitations imposed by Florida Statutes § 112.533(1). Necessarily, this type of body is less independent of police involvement than the disciplinary-recommendation model. Associated expenses would include legal, other personnel, and administrative costs. In addition, the use of this model carries with it a risk that conclusions by such a body could impair the City's ability to defend itself in lawsuits filed by individuals claiming unlawful actions against them by the police.

The executive-investigative audit model. Here the CRB would be created by the Sheriff. This type of CRB would engage in the same type of investigations or audits as described above, the difference being that the because the Sheriff has the exclusive power to operate the Sheriff's Office, the Sheriff would have greater power to implement more far-reaching reforms as suggested by a CRB.

V. CONCLUSION

The purpose of any CRB is to reinforce trust and establish transparency between law enforcement and the community. Under Florida law, a CRB may not be empowered to conduct the initial investigation of complaints and officer conduct that could lead to officer discipline, unless the sheriff or police chief has made the CRB, in whatever form, the procedure for reviewing police conduct and investigating complaints against an agency's officers. In Jacksonville, the Sheriff has designated the Internal Affairs Unit to perform all investigations of civil complaints regarding officer conduct. Therefore, City Council may not establish a body to investigate simultaneously with JSO Internal Affairs. However, City Council may empower a body to review generally the performance of the JSO and make appropriate legislative recommendations to the City Council as it determines appropriate and in the best interest of the community at large, provided that the CRB's investigation does not interfere with the Sheriff's Charter and statutory duties.⁴

⁴ It should also be noted that a meritorious complaint about police conduct could also result in State of Florida investigations and actions against the involved officer's law enforcement certificate. Care would need to be taken to avoid interfering with such investigations.