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Subpoena Power of Miami Police Probe Panel Faces Challenge

Celia Ampel, Daily Business Review

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A Miami civilian panel that reviews allegations of police misconduct is overstepping its bounds, an attorney for police argued Tuesday before the Florida Supreme Court.

The city-created Civilian Investigative Panel should not be able to subpoena witnesses, re-investigate complaints the police department's internal affairs division has already reviewed and recommend discipline, argued Robert Buschel of Buschel Gibbons in Fort Lauderdale.

Buschel's clients, Miami police Lt. Freddy D'Agastino and the Fraternal Order of Police, are asking the court to reverse rulings from appellate and trial courts saying the city can endow a community board with those powers. Because civilian review groups are not subject to the Florida law on police officers' rights during investigations, the city is skirting the law's safeguards for officers by creating the panel, Buschel argued.

"They want to say it's independent, but it's really not," he said. "Behind the curtain is the city."

Attorneys for the city argued the panel is operating within the law. The group has no power to discipline any officer, and the law says the police chief may not impose discipline unless there was an investigation that complies with the officers' bill of rights, said Edward Guedes of Weiss Serota Helfman Cole & Bierman in Coral Gables. As a safeguard, he noted the panel allows the officer under investigation to refuse to testify.

Sometimes an internal affairs investigation isn't thorough, and Miamians want a way to obtain additional testimony and evidence to understand what happened, Guedes argued. The subpoena power allows the panel to do that.

"This was an entity created by referendum," Guedes said. "The public wanted a voice in these proceedings. The public wanted some level of oversight."

Voters approved the creation of the panel in November 2001 amid widespread concern about police shootings. Eleven officers assigned to special enforcement teams were charged two months

earlier with misconduct dating back to the mid-1990s for allegedly planting guns at the scene of civilian shootings or covering it up.

D'Agastino's case arose after the internal affairs division investigated his conduct during a traffic stop and issued "inconclusive" results. The panel then subpoenaed D'Agastino to testify before its complaint committee. D'Agastino sought to quash the subpoena, but the trial court ruled against him, and he appealed.

The litigation has been ongoing for a decade, including a three-year wait for a rehearing before the Third District Court of Appeal. In the meantime, there has been a "self-imposed stay," and the panel has not compelled officers to appear, Buschel said.

He also argued the Third District's decision was inconsistent with a Fifth District Court of Appeal opinion, *Demings v. Orange County Citizens Review Board*, which found a county charter creating a citizens review board unconstitutional. [That opinion](#) was written by now-Justice C. Alan Lawson, who moved up to the Supreme Court just last month.

Lawson wondered Tuesday whether the facts of the cases were the same. In *Demings*, the sheriff who brought the case was elected, while the Miami police chief is not elected and answers to the city manager.

The justices also asked concerned questions of both sides about the potential impact of any particular change, such as the elimination of the panel's subpoena power. When Buschel argued against a powerful city-created investigative body that may duplicate the work of the internal affairs division, Justice R. Fred Lewis worried about transparency.

"I think it just hurts your ears when you hear that nobody can look at what has occurred in a circumstance and make comments about it," Lewis said.

Along with Buschel, Ronald Cohen of Rice Pugatch Robinson Storfer & Cohen in Fort Lauderdale represents the petitioners.

Miami City Attorney John Greco and Weiss Serota partner John Quick joined Guedes in representing the city.

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