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## Complaint Review Boards for Florida's Police Officers: Who's Complaining?

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# Complaint Review Boards for Florida's Police Officers: Who's Complaining?

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## **Abstract**

The Florida Legislature enacted Florida Statutes sections 112.531-.34 to formally grant specific civil rights to Florida law enforcement officers whose official conduct was under investigation.

**KEYWORDS:** complaint, boards, police

## Complaint Review Boards for Florida's Police Officers: Who's Complaining?

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The Florida Legislature enacted Florida Statutes sections 112.531-.34<sup>1</sup> to formally grant specific civil rights to Florida law enforcement officers whose official conduct was under investigation. The rights entitle officers to notice of disciplinary action, presence of counsel, and to the formation of a complaint review board where grievances may be aired.<sup>2</sup> The statute provides that officers may institute civil suits where the rights are abridged;<sup>3</sup> and every agency employing law enforcement officers is required to create a system to receive and process complaints.<sup>4</sup> Injunctive relief may be sought where an agency fails to comply with these requirements.<sup>5</sup>

Florida Statutes section 112.532(2), which establishes the Complaint Review Board, has recently become controversial. The section states:

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 being selected 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.<sup>6</sup>

Throughout Florida, courts have rendered opinions offering various in-

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1. FLA. STAT. § 112.531-.34 (1981).
2. FLA. STAT. § 112.532(2) (1981).
3. FLA. STAT. § 112.532(3) (1981).
4. FLA. STAT. § 112.533 (1981).
5. FLA. STAT. § 112.534 (1981).
6. FLA. STAT. § 112.532(2) (1981).

terpretations and applications of this area of legislation. Although the Florida Supreme Court has recently reviewed a case specifically involving the purpose behind section 112.532(2), further legislative action is required to uniformly set the complaint review board process in motion.

The objective of this note is to examine the rationale behind the diverse opinions, to examine similar legislative action in other progressive states, and to offer suggestions to achieve a clarified statutory scheme in Florida concerning the civil rights of its law enforcement officers. In addition, since the statute includes provisions for dismissals or suspensions, its compliance with procedural due process requirements will be reviewed. Finally, this note will outline an innovative plan by which the civil rights of Florida police officers can be protected through the use of complaint review boards.

### Legislative Purpose

Florida Statutes sections 112.531-.34 were enacted in 1974,<sup>7</sup> and have remained relatively unchanged. Section 112.532(2) specifically deals with a complaint review board. As it presently exists, however, section 112.532(2) fails to define the purpose or power of the complaint review board. *Longo v. City of Hallandale*,<sup>8</sup> a Broward Circuit Court decision, delved into the legislative proceedings records in an attempt to ascertain the intent of this enactment:

[T]he purpose of the act is to protect a police officer from arbitrary and unreasonable interrogation and investigation by superior officers whom he is otherwise in no position to resist. It is also clear from the legislative debates that the act was intended to apply only to *intra*-departmental interrogation and investigation, and had as its purpose the protection of subordinate officers from 'third degree' tactics by superior officers, especially in jurisdictions where the subordinate officer was not protected by civil service.<sup>9</sup>

As to section 112.532(2) specifically, the *Longo* court concluded:

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7. 1974 Fla. Laws 728.

8. 42 Fla. Supp. 53 (Fla. 17th Cir. Ct. 1975).

9. *Id.* at 57.

In addition, we are uncertain as to the functions of the complaint review board provided in § 2(2), when and how it is to be implemented in the event of a dispute, what it is supposed to do, and what effect or weight is to be given and by whom to its determination, assuming it is supposed to make a determination.<sup>10</sup>

To assist the Florida Legislature in pinpointing areas requiring clarification through amendment, a review of similar enactments in Texas and Pennsylvania proves beneficial.

## Civil Rights Protection for Police Officers in Other States

### *Policemen's Civil Service in Texas*

The law enforcement officers of Texas have been afforded numerous civil rights to protect their employment status through Article 1269m, Texas Civil Statutes Annotated.<sup>11</sup> The Article establishes a *Policemen's Civil Service*,<sup>12</sup> complete with a commission overseeing the Civil Service activities, in all but the smallest cities in the state. The commission is comprised of three members who are appointed by the city's chief executive. Each member must be a *citizen* of the particular city, over twenty-five years of age, and must not have occupied any public office within the three years preceding appointment.

The commission is formally required to inspect all police departments annually to ensure compliance with the civil service regulations.<sup>13</sup> It may further initiate investigations into matters concerning alleged violations of law enforcement officers' rights. The commission has the power to subpoena, order depositions and request production of evidence, as well as administer oaths. Article 1269m, in fact, comments that the commission's powers are to be honored in the same manner as those of any civil court.

In order for an officer to receive a review hearing before the commission, he must file a statement denying the allegations against him

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10. *Id.* at 59.

11. TEX. REV. CIV. STAT. ANN. art 1269m (Vernon 1963 & Supp. 1982).

12. *Id.* § 1 Creation of Firemen's and Policemen's Civil Service; § 3 Firemen's and Policemen's Civil Service Commission. Texas firemen also have the protection of this statute.

13. *Id.* § 5a Investigations and inspections.

within ten days after notice of termination.<sup>14</sup> The complainant has the right to counsel at the hearing, and may invoke the witness rule. The commission's decision is to be based solely on evidence presented at the hearing. If a policeman is dissatisfied with the commission's findings, that officer may petition the district court for relief within ten days after the decision.<sup>15</sup> The court may set aside the commission's ruling and order the case tried *de novo*.

Where an aggrieved officer is granted reinstatement by the commission, the employing department must immediately comply; failure to do so will subject the department head to contempt sanctions. If the disobedience continues for ten days, the chief executive has a duty to discharge that department head from city employment.<sup>16</sup>

Texas courts have had much success in applying these specific guidelines to particular cases. For example, a Texas Court of Civil Appeals reviewed an order handed down by a city's Civil Service Commission in *Richardson v. City of Pasadena*.<sup>17</sup> In *Richardson*, an aggrieved policeman petitioned the court to set aside the commission's order, which had affirmed his dismissal for refusing to submit to a polygraph examination. The officer claimed that, *after* the civil service hearing had concluded, the commission improperly received several affidavits buttressing the insubordination charges. The police officer contended that the commission violated his civil rights by reviewing the affidavits out of the presence of the officer or his attorney.

The Court of Civil Appeals first concluded that the dismissal was founded upon legitimate principles: "Insubordination in refusing a reasonable and constitutional command cannot be upheld without jeopardizing the system of police administration which is premised on discipline."<sup>18</sup> The court then rejected the claim that the post-hearing

14. *Id.* § 17 Procedure before Commission.

15. *Id.* § 18 Appeal to District Court.

16. *Id.* § 16 Indefinite suspensions.

17. 500 S.W.2d 175 (Tex. 14th Civ. App. 1973), *reversed on factual grounds*, 513 S.W.2d 1 (Tex. 1974). For a discussion of the *Richardson* reversal, see *infra* note 19.

18. *Richardson*, 500 S.W.2d at 177. *Accord* State Dep't of Highway Safety and Motor Vehicles v. Zimmer, 398 So. 2d 463 (Fla. 4th Dist. Ct. App. 1981); Farmer v. City of Fort Lauderdale, 400 So. 2d 99 (Fla. 4th Dist. Ct. App. 1981).

*But see* Farmer v. City of Fort Lauderdale, 8 Fla. Law Weekly 68 (Fla. Feb. 20,

affidavits tainted the commission's ruling, and refused to order a new hearing. The fact that substantial evidence had been presented *during* the hearing, in the presence of the officer and his counsel, was sufficient to find the officer guilty of insubordination. However, the court, in dicta, stated that if the post-hearing affidavits had been the sole basis for the commission's decision, the officer's due process rights would have been violated.<sup>19</sup>

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1983) (Case No. 61,001), in which the Florida Supreme Court overturned the *Zimmer* rationale which had established the reasonableness of ordering police officers to take polygraph examinations, so long as officers were not coerced into waiving their Fifth Amendment rights against self-incrimination. The court discussed the stance of other jurisdictions on the reasonableness issue related to compulsory polygraph examinations of public employees, including *Richardson*.

Justice Adkins, in his majority opinion, stressed the failure of polygraph proponents to demonstrate the science's reliability to a judicially recognizable level. Consequently, Justice Adkins deemed compulsory orders to submit to these examinations *unreasonable*. *Farmer*, 8 Fla. Law Weekly at 69 (citing *Zimmer*, 398 So. 2d at 466-67 (Anstead, J., dissenting)). "Suffice it to say that polygraph testing has not taken its place alongside fingerprint analysis as an established forensic science. It may someday meet that burden, but has as yet not done so." *Farmer*, 8 Fla. Law Weekly at 70. Recognizing that the complaining officer freely answered questions posed to him without the threat of polygraph testing, the majority concluded that:

[t]o further subject petitioner to the same questions when he is attached to a machine of undemonstrated scientific reliability and validity to obtain test results which could not be used in court, is, we believe, not a lawful and reasonable order and can thus not provide a basis for dismissal.

*Id.*

Chief Justice Alderman dissented, citing the *Zimmer* case as supporting the reasonableness of orders to submit to polygraph examinations in the *public* sphere, where the personal integrity of employees is a prime concern. *Farmer*, 8 Fla. Law Weekly at 71.

The *Farmer* decision severely hampers the internal investigative processes of Florida police departments. This concern was discounted by the *Farmer* majority, however, which adjudged that "the possible investigative benefit of building a case upon the foundation of the results of a polygraph examination is too thin a reed to support a denial of a police officer's right to be subjected only to lawful and reasonable orders." *Id.* at 70. Judicial and legislative attack against the *Farmer* ruling can be expected soon. Fort Lauderdale Assistant City Attorney Jerry Knight has indicated that the City will petition the United States Supreme Court for a writ of certiorari in *Farmer*.

19. *Richardson*, 500 S.W.2d at 178. See § 17 Procedure before Commission. Unfortunately, the availability of clear legislative guidelines does not necessarily assure their correct application. In *Richardson v. City of Pasadena*, 513 S.W.2d 1 (Tex.

It is important to recognize that, because the Commission's structure and procedures were clearly enumerated by the legislature, the appellate court had ample guidelines to follow in making its determination.<sup>20</sup>

### *Civil Service Protection in Pennsylvania*

Pennsylvania's statutory counterpart equals the specificity of the Texas statute.<sup>21</sup> The two enactments differ, however, in the selection of commission members. While Texas places the authority to appoint with the chief executive of the particular city, and requires a three-year gap between public office and commission duty, Pennsylvania law dictates that elections by the city council be used to select commission members, and fails to require an interval from public office.<sup>22</sup>

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1974), the Texas Supreme Court reversed the lower court's ruling that substantial evidence of insubordination had been presented at the commission hearing. In its reversing opinion, the court stated that:

the testimony . . . was directly in conflict on the essential issue of whether Richardson disobeyed an order or merely refused a request. When the hearing ended, the Commission's decision rested on which man the Commissioners believed; there was no other evidence. The subsequently submitted affidavits bore directly on the essential fact issue in the case; yet Richardson had no opportunity to cross examine the affiants, object to the affidavits or offer rebuttal testimony prior to the Commission's resolution of this disputed fact issue.

*Id.* at 4.

Based on its perception of the facts, the court concluded that "[i]t is only when a decision is influenced by evidence of which one party has no knowledge or has no chance to confront and explain that a due process problem arises." *Id.*

20. Although the factual issues in *Richardson* produced differing opinions at the appellate levels, the clear and unambiguous legislation contained in Article 1269m allowed no discrepancies as to the legal principles to be applied:

The Firemen's and Policemen's Civil Service Act provides for a trial de novo in the district court in the event the policemen [sic] is dissatisfied with the decision of the Commission. Such an appeal is governed by the substantial evidence rule. The review is limited to an ascertainment of whether there was substantial evidence reasonably sufficient to support the challenged order.

500 S.W.2d at 177-78.

21. PA. STAT. ANN. tit. 53, §§ 12621-12638 (Purdon 1957 & Supp. 1982).

22. *Id.* § 12625 Civil service commission; election; organization; oath of commissioners; powers as to investigations.



The statutes correspond in their grants of power to these tribunals. The Pennsylvania commission's decisions are binding, and carry contempt sanctions for non-compliance. Both enactments require that notice of dismissal be given to the officer prior to actual termination, including notice of the officer's right to a review hearing.<sup>23</sup>

### Procedural Due Process Rights of Governmental Employees: Recent Supreme Court Rationale

#### *Procedural Due Process and Federal Employment: Arnett v. Kennedy*

Florida Statutes section 112.532(4) requires that notice of impending disciplinary action be given to an officer.<sup>24</sup> However, due to the fact that a dismissal may deprive a governmental employee of economic security and future employment, the statute could be constitutionally attacked as being insufficient in terms of procedural due process.

The United States Supreme Court, in *Arnett v. Kennedy*,<sup>25</sup> discussed the adequacy of procedural due process constraints set forth in a federal employment statute. Kennedy was a non-probationary federal employee who was terminated for allegedly slandering his superior. The employee asserted that the statute, which authorized termination only for *cause*, did not specify his right to a trial-type hearing before removal, thereby denying him procedural due process of law.

Justice Rehnquist, speaking for a plurality of the Court, pointed out that the federal statute had been supplemented by federal Civil Service regulations. These regulations enlarged the statute's protections, by requiring an evidentiary hearing before a Civil Service Commission where the employing agency had previously decided to termi-

23. *Id.* § 12638 Removal, etc.; statement of reasons; investigations and hearings; written charges against policemen and firemen; suspension pending hearing.

24. FLA. STAT. § 112.532(4) (1981) states:

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 unless such law enforcement officer is notified of the action and the reason or reasons therefor prior to the effective date of such action.

25. 416 U.S. 134 (1974).

nate the employee.

More importantly, the plurality opinion stated that a statute which allows termination only for *cause* may also establish the method in which *cause* is determined. Because the employee's interest is created statutorily, that interest may also be terminated by statute, without regard to the constitutional guarantees applicable to other types of interests. The Court reasoned that "the employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause."<sup>26</sup> Relating this theory to the facts of *Arnett*, Justice Rehnquist upheld the procedural limitations embodied in the federal employment statute, stating that "the Government might, . . . constitutionally deal with appellee's claims as it proposed to do here."<sup>27</sup>

In *Arnett*, Kennedy also contended that he was effectively accused of dishonesty, thereby damaging his reputation as a loyal and trustworthy employee. He argued that the Fifth Amendment entitled him to a hearing before he could be deprived of this *liberty* interest.<sup>28</sup> The plurality responded negatively to this argument, by determining that the employee's reputation was not damaged as a result of the termination. To clarify this position, Justice Rehnquist cited *Board of Regents v. Roth*,<sup>29</sup> which involved an untenured teacher's attempt to be rehired:

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and

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26. *Id.* at 152. Justice Rehnquist alluded to a sliding-scale approach to issues of constitutional protection: "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Id.* at 153.

27. *Id.* at 155. While the Court quickly passed over the property interest issue, its recognition of the review procedures afforded by the statute and supplemental Civil Service regulations implied that a property interest was granted to the employee, but that the review procedures satisfied due process requirements. This rationale leads directly to Justice Rehnquist's reliance on the theory of exhaustion of administrative remedies, later in the opinion.

28. "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

29. 408 U.S. 564 (1972).

associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. . . . In such a case, due process would accord an opportunity to refute the charge. . . .<sup>30</sup>

Justice Rehnquist concluded by pointing out the limited purpose of administrative hearings, and the need to exhaust those remedies before seeking judicial relief:

[L]iberty is not offended by dismissal from employment itself, but instead based upon an unsupported charge which could wrongfully injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person an opportunity to clear his name, a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause. Here appellee chose not to rely on his administrative appeal, which, if his factual contentions are correct, might well have vindicated his reputation. . . .<sup>31</sup>

The concurring opinion of Justice Powell, with whom Justice Blackmun joined, found fault in Justice Rehnquist's reliance on the statute's own procedural limitations system: "Governmental deprivation of [a property or liberty] interest must be accompanied by minimum procedural safeguards, including some form of notice and a hearing."<sup>32</sup> Justice Powell reiterated the Court's opinions in *Board of Regents v.*

30. *Arnett*, 416 U.S. at 156-57 (citing *Roth*, 408 U.S. at 573).

31. *Arnett*, 416 U.S. at 157. The plurality opinion concluded:

In sum, we hold that the [Act], . . . did not create an expectancy of job retention in those employees requiring procedural protection under the Due Process Clause *beyond that afforded here* by the statute and related agency regulations. We also conclude that the post-termination hearing procedures provided by the Civil Service Commission . . . adequately protect those federal employees' liberty interest, . . . in not being wrongfully stigmatized by untrue and unsupported administrative charges.

*Id.* at 163 (emphasis added).

32. *Id.* at 164. See *Boddie v. Connecticut*, 401 U.S. 371 (1971): "The formality and procedural requisites for [a due process] hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Id.* at 378.

*Roth*<sup>33</sup> and *Perry v. Sindermann*,<sup>34</sup> which discussed the proper definition of a property interest, and the duties of agencies granting such interests. In *Roth*, the Court had established that a person was granted a property interest only where he had:

[A] legitimate claim of entitlement to it. . . . It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. . . .

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.<sup>35</sup>

The *Sindermann* Court had emphasized that once a property interest had been granted, deprivation of that interest would have to be accompanied by some form of notice and a hearing.<sup>36</sup>

Justice Powell reasoned that once a property interest was granted by the legislature, the *Constitution* would determine what procedural constraints would be required. Relating this rationale to the facts in *Arnett*, he found that the federal statute, which guaranteed continual employment absent *cause* for discharge, granted the employee a claim of entitlement to employment.<sup>37</sup> Justice Powell concluded that the em-

33. 408 U.S. 564 (1972).

34. 408 U.S. 593 (1972).

35. *Arnett*, 416 U.S. at 165 (citing *Roth*, 408 U.S. at 577).

36. *Arnett*, 416 U.S. at 165-66.

37. *Id.* at 166. Justice Powell further commented:

The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. . . . This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of a statutorily created property interest must be analyzed in constitutional terms.

ployee was thereby entitled to notice and a review hearing as required by the Due Process Clause.<sup>38</sup>

Justice White's concurring opinion in *Arnett* found that, while the Constitution required notice and opportunity for hearing, the statute and its supplementary review guidelines satisfied these requirements.<sup>39</sup>

Justice Marshall, dissenting in *Arnett*, agreed that the Constitution should govern the adequacy of termination review procedures. However, utilizing a balancing test to determine whether a *post*-dismissal hearing was sufficient under the circumstances, Justice Marshall found that the inevitable delays in the statute's appeal process unduly burdened the employee's financial resources, and necessitated a *pre*-dis-

*Id.* at 166-67. See also *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Justice Powell also discussed whether an evidentiary hearing was required *before* removal: "The resolution of this issue depends on a balancing process in which the Government's interest in expeditious removal of an unsatisfactory employee is weighed against the interest of the affected employee in continued public employment." *Arnett*, 416 U.S. at 167-68. Reasoning that the government's removal interest was substantial, and in light of the fact that appellee would be entitled to backpay and reinstatement if he prevailed on the merits, Justice Powell found that a *pre*-termination hearing was not necessary. *Id.* at 171. Cf. *Goldberg*, 397 U.S. 254, where the impending discontinuance of welfare benefits warranted a *pre*-termination hearing because "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Id.* at 264.

38. *Arnett*, 416 U.S. at 166. Although disagreeing with the plurality's approach to procedural due process analysis, Justice Powell ultimately concurred in the finding that the statute and Civil Service rules together provided an adequate termination review system.

39. *Id.* at 185-86. Justice White remarked:

[A]s a matter of due process, a hearing must be held at some time before a competitive civil service employee may be finally terminated for misconduct. Here, the Constitution and the [Act] converge, because a full trial-type hearing is provided before termination from the service becomes final. . . .

A different case might be put, of course, if the termination were for reasons of pure inefficiency, assuming such a general reason could be given, in which case it would be at least arguable that a hearing would serve no useful purpose and that judgments of this kind are best left to the discretion of administrative officials.

*Id.*

missal hearing.<sup>40</sup>

### *Procedural Due Process and State Employment: Bishop v. Wood*

More recently, the United States Supreme Court resolved a controversy involving the statutory grounds for termination of a municipal police officer. The petitioner, in *Bishop v. Wood*,<sup>41</sup> asserted that a city employment ordinance violated his procedural due process rights by failing to grant him the right to a termination review hearing. Officer Bishop contended that, as a permanent city employee whose termination was authorized only on specific grounds, he had a sufficient expectancy of continual employment to constitute a protected property interest.

In rejecting the officer's property-interest argument, the Court noted that, because a state statute was involved, "the sufficiency of the claim of entitlement must be decided by reference to state law."<sup>42</sup> The majority followed the trial court's interpretation of state law, which held that the employee was merely given certain procedural rights which, in the instant case, were not violated by the terminating agency. This conclusion effectively foreclosed the petitioner's "continual employment" argument, by classifying him as *terminable at will*.<sup>43</sup>

The officer also asserted, however, that the reasons for his discharge seriously stigmatized his reputation, thereby depriving him of his *liberty* without due process.<sup>44</sup> Reasoning that the absence of public

40. *Id.* at 226-27. Justices Douglas and Brennan concurred in the Marshall dissent. Justice Marshall noted: "We have repeatedly observed that due process requires that a hearing be held at a *meaningful time and in a meaningful manner*, but it remains for us to give content to that general principle in this case by balancing the Government's asserted interests against those of the discharged employee." *Id.* at 212 (citing excerpts from *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added)). See also *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

Justice Marshall theorized that "the plight of a discharged employee may not be far different from that of the welfare recipient in *Goldberg* who, pending resolution of a controversy . . . may [be] deprive[d] . . . of the very means by which to live while he waits." *Arnett*, 416 U.S. at 220 (citing *Goldberg*, 397 U.S. at 264).

41. 426 U.S. 341 (1976).

42. *Id.* at 344.

43. See *Bishop v. Wood*, 377 F. Supp. 501, 504 (W.D.N.C. 1973).

44. Officer Bishop was dismissed based on a failure to follow certain orders, poor

disclosure prevented the alleged impairment of the officer's "good name, reputation, honor, or integrity",<sup>45</sup> the Supreme Court cited the rationale pronounced in *Board of Regents v. Roth*:<sup>46</sup> "[It stretches the concept too far]to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."<sup>47</sup> The Court affirmed the trial court's decision to deny hearing rights to the officer, by stating:

In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular, and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.<sup>48</sup>

Justices Brennan and Marshall, in their dissenting opinion, reasoned that the charges made by the employing agency warranted a hearing to allow the officer an opportunity to clear his name. Although no public disclosure had been made, the Justices recognized that, when prospective employers inquired into the employee's past through his previous employers, disclosure of the charges was imminent.<sup>49</sup>

Most importantly, the dissenters joined in censoring the majority's adoption of the rationale that the statute, and not the Constitution,

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attendance at police training classes, causing low morale, and conduct unsuited to an officer.

45. *Bishop*, 426 U.S. at 348. See *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); see also *Paul v. Davis*, 424 U.S. 693 (1976), which discussed the interplay of reputation and employment.

46. 408 U.S. 564 (1972).

47. *Bishop*, 426 U.S. at 348 (citing 408 U.S. at 575).

48. *Bishop*, 426 U.S. at 350.

49. "It is difficult to imagine a greater 'badge of infamy' that could be imposed on one following petitioner's calling; in a profession in which prospective employees are invariably investigated, petitioner's job prospects will be severely constricted by the governmental action in this case." *Id.* at 350. The dissent further reasoned that "merely because the derogatory information is filed in respondent's records and no 'publication' occurs until shortly after [petitioner's] discharge from employment does not subvert the fact that a postdeprivation hearing to accord petitioner opportunity to clear his name has been contemplated by our cases." *Id.* at 352.

governed the sufficiency of administrative review. The dissent pointed out that six Justices had plainly rejected that view in *Arnett v. Kennedy*.<sup>50</sup>

*Bishop v. Wood* illustrates the Court's preference for a federalistic stance, when afforded a direct interpretation of state law which finds that no property interest has been created by state or municipal legislation. The *Arnett* and *Bishop* decisions offer the theory that, where property interests are specifically granted, evidentiary-type review hearings must be made available. Where such interests are lacking, however, compliance with statutory termination procedures is the only prerequisite to lawful dismissal.

This rationale directs the focus into Florida case law to determine whether state law enforcement officers have protected property interests in their employment. If such interests have been granted, termination procedures concerning those officers must comply with the requirements of procedural due process in order to sustain a constitutional attack.

### Property Interests of Florida Police Officers

The issue of whether Florida Statutes section 112.532(2) granted law enforcement officers the right to a review hearing was discussed in *West v. State, Department of Criminal Law Enforcement*.<sup>51</sup> Special

50. Justice White's dissent summarized: "The majority's holding . . . rests, then, on the fact that state law provides no procedures for assuring that the City Manager dismiss [petitioner] only for cause. The right to his job . . . is thus redefined . . . by the procedures provided . . . and as redefined is infringed only if the procedures are not followed." *Id.* at 357. The opinion of Justice White concluded:

The views now expressed by the majority are thus squarely contrary to the views expressed by a majority of the Justices in *Arnett*. . . . The ordinance plainly grants petitioner a right to his job unless there is cause to fire him. Having granted him such a right it is the Federal Constitution, not state law, which determines the process to be applied in connection with any state decision to deprive him of it.

*Id.* at 360-61. Compare *id.* at 345 n.8, where the majority attempts to distinguish *Arnett* by finding that the differences of opinion hinged on federal regulation interpretation, with *id.* at 360 n.3, where the dissent maintains that the Constitution's interplay with employment regulations was the obstacle dividing the *Arnett* Justices.

51. 371 So. 2d 107 (Fla. 1st Dist. Ct. App. 1978).



agent West was terminated for allegedly violating department orders. He requested a complaint review board hearing to determine whether his dismissal was justified. Upon the Department's denial of the request, West appealed directly to the First District Court of Appeal, requesting that his right to a hearing be established.

The First District held that section 112.532(2) did in fact grant West the right to a hearing.<sup>52</sup> The court's decision was apparently swayed by West's lack of opportunity to examine evidence and cross-examine witnesses against him. In a questionable move, however, the appellate court concluded that the language of section 112.532(2) made it *apparent* that complaint review board hearings must conform with the requirements of due process.<sup>53</sup>

This broad statement affecting section 112.532(2) is troubling, since no mention was made of statutory language implying any "legitimate claim of entitlement" to continual employment.<sup>54</sup> When viewed in light of the *Roth-Arnett-Bishop* sequence of cases, the *West* decision clearly falls short of judicially recognizing that Florida law enforcement officers enjoy property interests in their employment.

The ruling seems instead to have rested on the officer's claim of *liberty* deprivation, alleging that his reputation had been injured by media coverage of the controversy. The United States Supreme Court would apparently concur in granting West certain procedural due process rights, assuming the officer sufficiently pled injury to his reputation. However, if no liberty deprivation had been pled, the Court would no doubt rule that no hearing rights were granted absent a determination that a Florida employment statute had granted property interests to law enforcement officers.<sup>55</sup> Because *West* was primarily based on a liberty argument, no statutorily-created property interest was effectively established by the decision.<sup>56</sup>

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52. *Id.* at 109.

53. *Id.*

54. *See* *Arnett v. Kennedy*, 416 U.S. 134, 165 (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

55. *See* *Bishop v. Wood*, 426 U.S. 341 (1976).

56. The *West* court no doubt recognized the absence of civil service protections available to officers of the Department, and that Florida Statutes section 112.532(2), forming a complaint review board, was the only legislation offering these officers any hope of receiving review hearings. Florida Statutes section 110.051(3) (1977) had ex-

The property-interest issue was more directly addressed, however, in *Ragucci v. City of Plantation*.<sup>57</sup> Lieutenant Ragucci was dismissed from employment after an investigation allegedly revealed his involvement in the sale of fully automatic weapons, and narcotics usage. The officer was given a Complaint Review Board hearing, which resulted in a recommendation affirming the dismissal. Officer Ragucci then sued to have his right to a City Council review hearing established, pursuant to the procedures adopted in the City Charter.<sup>58</sup>

empted employees of the Department of Criminal Law Enforcement from the review procedures of the State Career Service System, contained in Florida Statutes section 110.061 (1977). In 1978, however, the Florida Legislature amended section 110.051(3) to provide that employees of the Department were now *subject to* section 110.061, *except in matters relating to transfer*. See 1978 Fla. Laws 720. These sections were renumbered in 1979: section 110.051(3) now appears as section 110.205(3); section 110.061 has been changed to section 110.227. See 1979 Fla. Laws 740. The amendments of 1980 (1980 Fla. Laws 1599), and 1981 (1981 Fla. Laws 842) have not affected subsection (3) of section 110.205.

Florida Statutes section 110.227 (1981) concerns the suspension, dismissal, reduction in pay, demotion, layoff or transfer of Career Service employees. Subpart (1) provides that permanent employees may be suspended or dismissed only for *cause*, e.g., negligence, insubordination, wilful violation of agency rules, conduct unbecoming a public employee, etc. Subpart (2) calls for the establishment of rules and procedures regarding disciplinary action, subject to approval by the Administration Commission. Subpart (5a) grants a permanent employee the right to written notice of disciplinary action at least ten days prior to the date such action becomes effective. The aggrieved employee must be given an opportunity to appear before the agency or official taking such action, within the ten-day period, in order to respond to the charges either orally or in writing. Suspended or dismissed employees are entitled to Career Service Commission hearings.

Florida Statutes section 110.305 (1981) spells out the powers and duties of the Commission. With the power to administer oaths, subpoena witnesses, and sanction hearing misconduct, perjury, or non-compliance with Commission orders, the Commission appears as a quasi-judicial body. Written notice of employee appeals must be filed within twenty days after receipt of notice of dismissal or suspension.

According to Florida Statutes section 110.309(5) (1981), the Commission's order is conclusive. A party may appeal that order, however, in the respective district court of appeal, pursuant to Florida Statutes section 120.68(2) (1981).

57. 407 So. 2d 932 (Fla. 4th Dist. Ct. App. 1981).

58. Plantation's City Charter provided that the mayor had a duty: to suspend any appointed officer, except councilmen, at any time for gross neglect or dereliction of duty; provided, however, that the grounds for suspension of a police officer . . . shall also include the following: Incompe-

The Fourth District Court of Appeal, reversing the trial court's ruling, held that the City's adopted procedures had to be followed, and that section 112.532(2) did not supplant that requirement. "What is at stake here is due process. Section 15 of the Charter conveyed upon the City's law enforcement officers a *property* interest in their employment because it expressly required that their termination be for cause."<sup>59</sup>

The *Ragucci* court adopted the views expressed in *Thurston v.*

tenacy, neglect of duty, drunkenness, immorality, failure to obey orders given by proper authorities, insubordination or any other just or reasonable cause, at the same time notifying such officer or police officer in writing the cause of the suspension, and giving him notice to appear at the next regular meeting of the Council and answer thereto.

*Id.* at 934 n.3. Compare *Lauderhill Code*, Division 2 (Civil Service), particularly sections 2-37 (Discharge, suspension, demotion of employees), and 2-38 (Appeal to Board); *Hallandale Code*, Chapter 21, sections 21-10 (Discharge of permanent employees—Notice of discharge), 21-11 (Same—Right to appeal to civil service board; time of hearing; notice to employee of hearing; hearing to be public), and 21-12 (Same—Amendment of charges prohibited; procedure of hearing; right to counsel at hearing; decision by civil service board).

Municipalities have been granted power to legislate in these areas through Florida Statutes section 166.021(4) (1981), which states:

The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. However, nothing in this act shall be construed to permit any changes . . . which affect . . . any rights of municipal employees, without approval by referendum. . . .

59. *Ragucci*, 407 So. 2d at 935 (emphasis added). Justice Anstead concurred specially, stating that the Plantation City Charter could be amended to do away with procedures which bog down the review process (such as the City Council's role in conducting the hearings). The concurring opinion also pointed out that termination of *Ragucci* could still be effectuated using the Charter's procedures, assuming that adequate grounds for dismissal existed. *Id.* at 936.

Plantation City Attorney Donald J. Lunny has indicated that an ordinance designed to place review hearings within the jurisdiction of a "Job Description Committee" has been proposed, in an effort to remove the City Council from the review process.

*Dekle*,<sup>60</sup> a Fifth Circuit Court of Appeals decision which had established property interests in employees under a Jacksonville Civil Service rule. That rule authorized suspension or dismissal of an employee only for *cause*, and included a lengthy checklist of possible employment violations satisfying the *cause* requirement. Also included were mandatory notice requirements, and an appeal procedure structured around a Civil Service Board.

The Fifth Circuit in *Thurston* held that "city employment which allows termination only for cause creates a constitutionally protectable property interest. Once created, the employment property interest may not be taken away without due process."<sup>61</sup> The *Thurston* court ruled that the procedures contained in the civil service rule did comport with the requirements suggested in *Arnett v. Kennedy*.<sup>62</sup>

The essential issue in *Thurston*, however, did not center on whether the existing provisions of the rule satisfied due process. The crux of *Thurston* focused on whether due process required the institution of additional procedural safeguards where employees are dismissed *before* review hearings are convened. The court responded in favor of the employees:

Where a governmental employer chooses to postpone the opportunity of a nonprobationary employee to secure a full-evidentiary hearing until after dismissal, risk reducing procedures must be accorded. These must include, prior to termination, written notice of the reasons for termination and an effective opportunity to rebut those reasons. Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision.<sup>63</sup>

It seems clear that Florida employment statutes or ordinances, which condition termination on a finding of *cause*, grant employees a

60. 531 F.2d 1264 (5th Cir. 1976).

61. *Id.* at 1272.

62. *Id.* at 1273. See *Arnett v. Kennedy*, 416 U.S. 134 (1974).

63. *Thurston*, 531 F.2d at 1273. Although the Fifth Circuit recognized that *Arnett* involved the adequacy of *existing* procedures, "[*Arnett* guides] us to focus on procedures which will minimize the risk of improper termination associated with any dismissal process." *Id.*

constitutionally protected property interest in continual employment. The *Roth-Arnett-Bishop* sequence tacitly concludes that any legislation which affords employees this type of interest must also include their constitutional right to an evidentiary-type hearing to review terminations. The *Thurston* decision imposes further restraints where the hearing is to be held *after* actual dismissal occurs.

### Do Sections 112.531-.34 Authorize Terminations Which Violate Procedural Due Process?

While the enactment of sections 112.531-.34 does not purport to grant any specific employment status to Florida law enforcement officers, section 112.532(4) authorizes dismissals and suspensions, conditioned only upon notification to the officer of the impending action and the reasons for it.<sup>64</sup>

Imagine a situation where a Florida police officer has been granted a recognized property interest by statute or ordinance, but is terminated under the provisions of section 112.532(4) after an investigation into his conduct allegedly reveals wrongdoing. While section 112.532(4) requires only notice of the dismissal and the reasons for it, due process may require an evidentiary hearing into the propriety of the action. Without granting the officer a review hearing, the officer's property interest would be violated. A successful constitutional attack against section 112.532(4) will require amendments granting disciplined officers the right to review hearings.<sup>65</sup>

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64. FLA. STAT. § 112.532(4) (1981).

65. Of course, since the courts do not favor constitutional disputes, perhaps the Florida Supreme Court will take affirmative action by applying a *gloss* over this controversial legislation. The court may require some type of review hearing to satisfy any constitutional concerns. *See infra* note 88.

Where the procedural due process rights of *probationary* law enforcement officers are concerned, *Bembanaste v. City of Hollywood*, 394 So. 2d 1053 (Fla. 4th Dist. Ct. App. 1981), offers some direction. Citing the City's civil service regulations which expressly allowed dismissal of probationary employees without cause, the Fourth District found that the officer was not entitled to a review hearing. Footnote 5 of the *Bembanaste* opinion indicated that, notwithstanding this hearing denial, the officer may have been entitled to a hearing on other grounds, specifically if his complaint had alleged 'stigmatization' as a result of the dismissal.

*See Codd v. Velger*, 429 U.S. 624 (1977), a *per curiam* (5-4) decision which in-

Assuming complaint review boards were established to review dismissals of police officers, their present undefined powers are clearly inadequate to protect the due process rights of these employees. Gathering the suggestions offered in *Arnett v. Kennedy*<sup>66</sup> and the sample legislation highlighted from Texas and Pennsylvania, the Complaint Review Board introduced in section 112.532(2) should possess quasi-judicial powers and should conduct review hearings with similar formalities. The Board's decision should have a binding effect on the parties, and provisions should be made for contempt sanctions, in the event the ruling is not fully obeyed.

### Statutory Interpretation Problems in the Florida Courts: Identifying the Purpose of the Complaint Review Board

Aside from the constitutional issues involved in implementing Florida Statutes sections 112.531-.34, Florida courts have produced various, if not contrary, interpretations regarding the purposes to be served by this legislation, and the procedures to be utilized in attaining those objectives. The disjointed and undefined layout of these sections has largely contributed to the confusion. Before any conclusions can be properly drawn concerning the actual purpose of the Complaint Review Board, however, a review of the applicable case law is necessary to re-

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involved a nontenured city policeman's attempt to gain hearing rights to review his dismissal. Finding that no property interest question was at issue, the Court focused on the policeman's claim of stigmatization. Recognizing that the Due Process Clause of the Fourteenth Amendment granted the officer an opportunity to refute the charges against him, the Court commented that "if the hearing . . . is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation." *Id.* at 627. Since the officer failed to substantially deny the charges, no right to a hearing was granted:

But the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is *solely* to provide the person an opportunity to clear his name. . . . Only if the employer creates and disseminates a *false* and defamatory impression about the employee in connection with his termination is such a hearing required.

*Id.* at 627-28 (emphasis added).

66. 416 U.S. 134.

veal the diverse opinions pronounced by the Florida courts.

A Broward Circuit Court decision, *Longo v. City of Hallandale*,<sup>67</sup> offers the most in-depth discussion of the apparent purposes behind sections 112.531-.34. Although the general intent to protect subordinates from intensive questioning was established by its lengthy investigation, the *Longo* court was unable to determine the exact purposes and powers attributable to the Complaint Review Board formed in section 112.532(2).<sup>68</sup>

Another legislative flaw was revealed in *City of Hallandale v. Inglema*,<sup>69</sup> where two municipal police officers sued to enjoin their city employer from disregarding the reinstatement recommendation handed down by a complaint review board. The Fourth District Court of Appeal reversed the trial court's order granting a temporary injunction against the city. Although the appellate court's decision rested on several grounds, its most important statement revealed the *advisory* nature of complaint review board decisions.<sup>70</sup> Since the injunction was based

67. 42 Fla. Supp. 53 (Fla. 17th Cir. Ct. 1975).

68. *Id.* at 57.

69. 346 So. 2d 84 (Fla. 4th Dist. Ct. App. 1977).

70. *Id.* at 86. The Fourth District relied on AGO 076-38, 1976 Op. Att'y Gen. 65 (Feb. 18, 1976), which stated in part:

Since no quasi-judicial powers or duties are prescribed by statute for any such complaint review board, any such board that might be established in connection with s.3 [section 112.533] of the act is not, *by the terms of Ch. 74-274*, made an 'adjudicatory board' or one vested with quasi-judicial powers, duties, or functions.

However, a municipality, under the authority of the Municipal Home Rule Powers Act (Ch. 166, F.S.), can create such a board in conjunction with the complaint processing and investigative system mandated by s.3 (s. 112.533, F.S.) of the act and prescribe its powers, duties, and functions so as to grant the board such quasi-judicial powers necessary to give the findings and determinations of any such board the status of final adjudications. . . .

*See also* AGO 075-41, 1975 Op. Att'y Gen. 68 (Feb. 19, 1975), which commented:

Section 2(2), Ch. 74-274, Laws of Florida, provides that a complaint review board 'shall be composed' of persons from specified areas, but does not give it any powers or duties whatsoever. The legislative history of the bill is unilluminating as to what the review board was intended to do. Furthermore, the original bill, Senate Bill 84, from which the act is derived, gave no powers to the board. . . .

solely on the board's recommendation, such relief was improperly granted.

The Third District Court of Appeal, in *Waters v. Purdy*,<sup>71</sup> further attempted to define the situations in which complaint review boards were available for termination review purposes. Officer Waters had been terminated for violating department personnel rules. The Third District emphasized the importance of defining the exact reasons for an officer's discharge when determining whether the right to a complaint review board hearing existed:

After scrutinizing Section 112.532, Florida Statutes (1975) in its entirety, we find that subsection (2) . . . must be read *in pari materia* with subsection (1) which provides in part:

. . . Whenever a law enforcement officer is *under investigation* and subject to interrogation . . . , such interrogation shall be conducted under the following conditions. . . .

. . . Waters was not under investigation, but rather was terminated for violation of . . . personnel rules which he admitted violating. . . . [S]ection 112.532(2), Florida Statutes (1975) is not applicable to the instant situation. . . .<sup>72</sup>

*Waters* determined that only officers dismissed as a result of agency investigations were entitled to the protections of the statute. This theory was expanded when the protections to be incorporated into the complaint review board process were discussed in *West v. State, Department of Criminal Law Enforcement*.<sup>73</sup> The First District Court of Appeal in *West* granted complaint review board hearing rights to an officer who was dismissed for violating department operational rules. Surprisingly, the First District's remarks disclosing the underlying rationale used to reach that result were rather shallow and vague, although the court apparently established that the officer was under investigation at the time of his dismissal.<sup>74</sup>

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71. 345 So. 2d 368 (Fla. 3d Dist. Ct. App. 1977).

72. *Id.* at 369 (emphasis added).

73. 371 So. 2d 107 (Fla. 1st Dist. Ct. App. 1978).

74. Note that the employing agency *admitted* the applicability of section 112.532(2), but defended on the ground that the complainant had not timely requested the hearing while he was *under investigation*. This classification of investigation-related dismissals parallels the views expressed by the Third District Court of Appeal in



Responding to the lack of statutory guidelines defining the powers and procedures of complaint review boards, the *West* court ruled that due process constraints would apply. The decision seemingly transformed a statutorily-naked Board hearing into a quasi-judicial proceeding to be used in determining the validity of investigation-based terminations. The First District also failed to reconcile this grant of power with the Board's established *advisory* authority. While the result in *West* seems in line with notions of fairness,<sup>75</sup> the blatant absence of a well-organized, in-depth synopsis of the court's thought processes is troubling.

However, the distress generated by the *West* court's conclusory statements, and general theory of complaint review board use, was soon quashed. The Florida Supreme Court, in *Mesa v. Rodriguez*,<sup>76</sup> tangentially redefined the scope and purpose of section 112.532(2). *Mesa* involved a dispute between an arrested citizen and the arresting officer, concerning the officer's conduct during the incident. The officer attempted to establish his right to civil action against the complaining citizen through section 112.532(3).<sup>77</sup>

While the *Mesa* decision held that the officer could not sue under section 112.532(3) because the citizen had not utilized the complaint process established pursuant to section 112.533,<sup>78</sup> the court in dictum pointed out that:

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*Waters.*

75. The First District was apparently swayed by the absence of alternative review remedies at the aggrieved officer's disposal. *See supra* note 55.

76. 357 So. 2d 711 (Fla. 1978).

77. FLA. STAT. § 112.532(3) (1981) states:

CIVIL SUITS BROUGHT BY LAW ENFORCEMENT OFFICERS—Every law enforcement 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 abridgement of the officer's civil rights arising out of the officer's performance of official duties.

78. FLA. STAT. § 112.533 (1981) reads: "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."

If Rodriguez [citizen] had chosen, he could have lodged a complaint with the investigation system set up, pursuant to the statute, by the Miami Police Department. His *complaint* could have been *reviewed* by a Complaint Review Board. . . . And, the board, after a hearing, would have had authority to render an advisory recommendation as to action to be taken against Officer Mesa.<sup>79</sup>

This dictum offered a suggested use for complaint review boards not readily ascertainable from the statute's face. Despite *Mesa's* views on the probable purpose of complaint review boards, however, Florida law remains unsettled on this issue. Although subsequent case law has concurred generally with the *Mesa* theory, a direct and authoritative pronouncement by the Florida Supreme Court is needed to fully and clearly resolve the existing uncertainty of complaint review board use.

The Fourth District Court of Appeal tracked the *Mesa* rationale recently in *Migliore v. City of Lauderhill*.<sup>80</sup> The *Migliore* court expressed its deep disapproval of the statutory interpretation pronounced in *West*. Officers Migliore and Picarelli were dismissed for disobeying a superior's order, although a citizen's complaint had been previously lodged against them. The officers were advised of their right to a hearing before the city's Civil Service Board,<sup>81</sup> but opted to seek the empaneling of a complaint review board pursuant to section 112.532(2). Upon the city's refusal to submit to the officers' demands, petitions for writs of mandamus and injunctive relief were filed against the city.

The Fourth District Court of Appeal affirmed the trial court's refusal to grant judicial relief to the officers, most importantly on the ground that the facts surrounding the officers' dismissals rendered a complaint review board hearing inapplicable. Before rendering its interpretation of the complaint review board's purpose, the Fourth District expressed its dismay over the absence of meaningful legislative guidelines embodied in section 112.532(2). To establish the circumstances in

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79. 357 So. 2d at 713 (emphasis added). The dissenting opinion of Justice Hatchett was not published, nor was any information concerning its contents available through the Clerk of the Florida Supreme Court.

80. 415 So. 2d 62 (Fla. 4th Dist. Ct. App. 1982), *approved*, 8 Fla. Law Weekly 159 (Fla. May 5, 1983) (Case No. 62,299). This author assisted Lauderhill City Attorney Anthony J. Titone in creating the appellee's jurisdictional and answer briefs to the Florida Supreme Court.

81. *See* Lauderhill Code §§ 2-37, 2-38.

which complaint review boards were to be used, the appellate court reviewed the entire statute, but centered its attention on section 112.533 for guidance:

The significant language of [section 112.533] 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. . . .<sup>82</sup>

In order to fully clarify its position, in light of the fact that a citizen's complaint had initially subjected the officers to official scrutiny, the court continued:

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.<sup>83</sup>

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82. *Migliore*, 415 So. 2d at 64 (emphasis added). See FLA. STAT. § 112.533 (1981). Note that although the Fourth District's interpretation of the Complaint Review Board's purpose mirrors that espoused by the Florida Supreme Court in *Mesa*, 357 So. 2d 711, the *Migliore* opinion makes no references to *Mesa* whatsoever.

83. *Migliore*, 415 So. 2d at 64-65. Commenting on the Complaint Review Board's questionable effectiveness in its present form, the Fourth District reiterated the finding that "its [the Board's] decision is not adjudicatory but advisory only." *Id.* at 65 (citing *City of Hallandale v. Inglima*, 346 So. 2d at 86). The *Migliore* court also focused on the doctrine of exhaustion of administrative remedies, stating that:

Appellants' claims . . . 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. . . . The Board, after an evidentiary hearing, may order reinstatement and back pay. . . . Appellants, having failed to avail themselves of the appropriate administrative remedy, cannot now obtain reinstatement or recover back pay.

415 So. 2d at 65.

Practitioners no doubt will argue as to the extent to which the *West* and *Migliore* interpretations conflict. As with all apparently conflicting opinions, however, distinctions inevitably will be found. One possible distinguishing factor is the presence of civil service protections in *Migliore*, and the absence of such alternative remedies in *West*. Moreover, the equitable circumstances surrounding the two cases are clearly contrasted. The complainants in *Migliore* sought judicial relief without exhausting the administrative remedies available, while the complaint review board hearing in *West* represented the only review method conceivably available to the aggrieved officer. Interestingly, with officers of the Florida Department of Criminal Law Enforcement now enjoying state civil service protections,<sup>84</sup> the prevailing equitable thrust behind the *West* decision seems to have vanished. While *West* may have been decided fairly under the circumstances, the theory of complaint review board use which *West* supported has been conclusively overturned by the Florida Supreme Court's approval of *Migliore*.<sup>85</sup>

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*See Florida Weld. & E. Serv., Inc. v. American Mut. Ins. Co.*, 285 So. 2d 386 (Fla. 1973): "Where a method of appeal from an administrative ruling has been provided, such method must be followed to the exclusion of any other system of review. Where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the courts will act." *Id.* at 389-90. *See also Brooks v. School Bd. of Brevard County*, 382 So. 2d 422 (Fla. 5th Dist. Ct. App. 1980).

The *Migliore* court also recognized a potential problem in the area of Complaint Review Board membership, as presently provided by section 112.532(2) (1981):

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.

415 So. 2d at 64.

84. *See* 1978 Fla. Laws 720.

85. *Migliore v. City of Lauderhill*, 8 Fla. Law Weekly 159 (Fla. May 5, 1983) (Case No. 62,299).

## Conclusion

Florida Statutes sections 112.531-.34 lack the legislative clarity and structure necessary to facilitate accurate and consistent judicial applications. The absence of expressed procedures and powers to implement the newly-ascertained purpose of complaint review boards inhibits meaningful reliance upon these provisions. The Florida Legislature should amend sections 112.531-.34 to closely parallel the specificity and depth of the Texas and Pennsylvania enactments discussed previously.<sup>86</sup>

As the court in *Longo v. City of Hallandale*<sup>87</sup> remarked, this legislation was apparently designed to protect the civil rights of law enforcement officers who did not otherwise enjoy civil service status. However, municipal ordinances and recent state legislation have brought civil service protections to seemingly all law enforcement officers in this state.<sup>88</sup> In addition, judicial developments up to and including the Florida Supreme Court opinion in *Migliore* have rejected the *Longo* view. The legislature must decide whether the purpose of this act has been accurately determined by the judiciary; if so, further legislative action is necessary to rid these sections of their present disabilities.

Moreover, the role which complaint review boards play in this legislative scheme remains a troubling mystery. In an attempt to reconcile the Board's placement among various civil rights provisions, this author offers the following analysis:

Because the legislature inherently utilizes legal jargon to ease judicial implementation, the word *Complaint* as used in section 112.532(2) gains crucial significance. A complaint represents the *initial* stage of litigation, or better yet, rights enforcement. Therefore, the theory that these boards are to serve as appellate forums for disciplined officers seems incongruous with the normal meaning given to the language used. A more plausible theory is that complaint review boards are to do just that—review complaints made by persons *outside* the police agency (citizens), concerning alleged misconduct demonstrated by the agency's officers.

In the event a complaint review board finds the complaint fairly

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86. See TEX. REV. CIV. STAT. ANN. art 1269m (Vernon 1963 & Supp. 1982); PA. STAT. ANN. tit. 53, §§ 12621-12638 (Purdon 1957 & Supp. 1982).

87. See *Longo v. City of Hallandale*, 42 Fla. Supp. 53 (Fla. 17th Cir. Ct. 1975).

88. See *supra* notes 55, 57.

substantiated by the evidence presented, it may recommend (or compel, if proper amendments are made) that formal investigations commence into the implicated officer's conduct. At this point, the civil rights set forth by the remaining provisions of this statute are activated. In order to prevent the officer from damaging his civil defenses against the complainant, his rights to counsel, and reasonable *discovery*, must be observed and preserved throughout the on-going departmental inquiries. The statute's injunctive and mandamus relief provision is available where these crucial rights are abridged during the investigation.

In light of the proposed purpose behind section 112.532(2), perhaps the citizen-oriented complaint review board envisioned in *Migliore* and *Mesa* will be formally and definitively established by the legislature.<sup>89</sup> In view of recent skirmishes involving police officers and citizens, a review panel of this type would be useful in resolving disputes concerning police conduct, and in promoting the community's belief that police conduct can be effectively scrutinized.<sup>90</sup> Whatever the legislature's intentions may be, amendments clearly expressing those intentions are needed if complaint review boards are to be effectively used in the future.

Furthermore, the legislature must not overlook the procedural due process rights of those affected by the statute. If provisions of this statute authorize dismissals, some formal requirements of notice and hearing rights must be mandated to protect officers who have been granted property interests in their employment.<sup>91</sup>

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89. Notwithstanding the Florida Supreme Court's approval of complaint review board use as espoused in *Migliore*, the Florida Legislature must elaborate through amendment as to how this supposed legislative purpose is to be achieved. Pre-hearing procedures must be established, as well as operating standards to maintain objectivity during the hearing process.

90. Despite the expectation that a citizen-oriented review system will result from the present disarray, this accomplishment may be tempered somewhat by recent state legislation limiting the information disclosed by public records. See 1982 Fla. Laws 3175, which amends section 112.533 by ordering the *deletion* of the identities of all witnesses and, most importantly, the officer under scrutiny from the record, where the complaint involved is found to be unsustainable. According to the newly-created subpart (2)(b) of section 112.533, such information may be disclosed to a *citizen* only through the discovery process of an on-going civil suit. This requirement severely limits the citizenry's access to important information concerning police conduct.

91. See *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Thurston v. Dekle*, 531 F.2d

Notwithstanding these shortcomings, Florida courts have valiantly attempted to apply this statute equitably in each fact situation. While the intended purpose of complaint review boards seems to have been conclusively ascertained, questions as to how that objective is to be uniformly implemented remain unanswered.<sup>92</sup> The period of permissive inactivity has passed; the time is now for legislative relief. Florida's law enforcement officers deserve a clear and meaningful statement of their civil rights.

*Anthony J. Carriuolo*

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1264 (5th Cir. 1976).

92. Without further legislative guidance, uniform civil rights protection for Florida police officers cannot be ensured.