

FREDDY D'AGASTINO, ET AL., APPELLANTS, V. CITY OF MIAMI, ET AL., APPELLEES
Case no.: 3D10-2704
Date: March 16, 2016
Case type: Police oversight
Court: Third District Court of Appeal
Author of opinion: Judge Frank A. Shepherd
Lawyer for petitioners: Ronald J. Cohen, Rice Pugatch Robinson Storfer & Cohen, Fort Lauderdale
Lawyers for respondents: City Attorney Victoria Mendez and Deputy City Attorney John A. Greco, Miami, and John J. Quick, Weiss Serota Helfman Cole & Bierman, Miami
Panel: Shepherd and Judge Linda Ann Wells; Judge Leslie B. Rothenberg (dissent)
Originating court: Miami-Dade Circuit Court

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ON APPEAL by NOREEN MARCUS

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Third District Preserves Citizen Oversight of Miami Police

The Miami Police Department isn't fond of the city's Civilian Investigative Panel, launched in 2001 after a dozen officers were accused of covering up evidence in suspicious fatal shootings.

For at least the past seven years the Fraternal Order of Police has waged a litigation war on the CIP. The police union succeeded at getting the oversight group to holster its subpoena power, about the only power it has.

But in January 2013 the CIP won its battle for survival in the Third District Court of Appeal. On March 16 it won again, though a cease-fire is unlikely.

Following what must have been a prolonged internal struggle, the Third District produced an unusual and stronger second panel opinion three years after first ruling the city had the authority to create a citizens review board. The entire court voted 7-3 against reviewing the case en banc and the panel majority declined to certify conflict and clear a path to the Florida Supreme Court.

Interestingly Judge Leslie Rothenberg dissented from both panel opinions, finding the municipal ordinance that created the CIP unconstitutional. She also called out the majority for refusing to certify what she considers an obvious conflict with the Fifth District Court of Appeal's 2009 decision in *Demings v. Orange County Citizens Review Board*.

Her minority status in the politically sensitive case raises the question of how effective a consensus builder Rothenberg will be as chief judge beginning July 1, 2017.

In an interview John Quick, the city's victorious appellate lawyer, wouldn't go there.

"I don't know enough about the judges and their relationships to comment," said Quick of Weiss Serota Helfman Cole & Bierman in Miami.

WHO'S TAILGATING?

He was more talkative about the im-

portance of the Third District ruling to preserve the CIP.

"If somebody were to look into the heart of what the CIP does they would see it's not pro-police or anti-police," Quick said. "It's pro-community. It helps build up police-community relations and gives residents an avenue to ensure that their voices are heard."

Instead of complying with a CIP subpoena, Lt. Freddy D'Agastino had an FOP lawyer fight it in court. Based on CIP



CIP executive director Cristina Beamud said, "It's important for the public to have some assurance that allegations against the police are investigated thoroughly."

records, here's what D'Agastino doesn't want to discuss:

On March 4, 2009, Nicole Alvarez was driving south on I-95 in Broward County. Alvarez was a 27-year-old prosecutor in the Broward State Attorney's Office. She said she noticed two city of Miami SUVs in front of and behind her, sandwiching her vehicle between them, and both drivers appeared to be talking on their cell phones.

At the Golden Glades intersection she saw the driver later identified as D'Agastino cruising beside her. He gave Alvarez what she described in her CIP complaint as a "sly smile" that she returned with a "look of disgust."

Then she changed lanes to avoid the SUVs and they changed lanes to keep boxing her in. Finally, near the exit to State Road 112, the driver of the front-running SUV cut her off and braked, nearly causing a collision, Alvarez said. D'Agastino stopped her and gave her a traffic citation for following too closely.

During a subsequent Internal Affairs investigation D'Agastino said Alvarez was tailgating the other officer. After the traffic stop she was uncooperative and tried to use her State Attorney credentials to get out of the ticket, D'Agastino said. The other officer corroborated the tailgating story, saying he used his cell to report Alvarez's infraction to D'Agastino.

Internal Affairs found the accounts "inconclusive" and closed the case. Later D'Agastino was promoted to commander.

Does Alvarez's allegation fit the definition of harassment?

CIP executive director Cristina Beamud said her colleagues are always debating what to call such incidents. Harassment is all about the victim's perception "and clearly she felt bothered," Beamud said.

DOWN THE ROAD

Assuming the case is resolved favorably to the CIP, it will try again to subpoena D'Agastino and follow through on investigating Alvarez's complaint.

"We haven't issued a subpoena since this case began," Beamud said.

Even if the CIP determines the complaint is actionable, D'Agastino won't necessarily be punished. The panel is authorized only to make recommendations to the police department, not to carry them out.

And it doesn't flood the MPD with recommendations. During the 2015 calendar year the CIP took in 276 cases and the panel sustained 11 percent of the complaints it considered, Beamud said.

She commends the Third District's decision, especially in light of recent violence that has impaired the public's trust in law enforcement. The shooting death last month of 6-year-old King Carter in Northwest Miami-Dade County galvanized the community to demand systemic responses to the random slayings of black children.



Attorney John Quick, who represented Miami, called the Civilian Investigative Panel "pro-community" and said it helps build police-community relations.

"It's important for the public to have some assurance that allegations against the police are investigated thoroughly and transparently," Beamud said. "And it's important that the judgments come from members of the community because it is their police department."

Building on Rothenberg's dissent, the FOP may try to persuade the Florida Supreme Court to accept the D'Agastino case for review.

Quick argues that when the facts are compared, there's no conflict between the Third District opinion and the Fifth District's *Demings* decision. The latter prevented a citizens review board from second-guessing a sheriff, a constitutional officer, as opposed to a police department.

Whether the high court agrees "depends on how deeply the Supreme Court looks at the conflict," Quick said. If it considers only the basic holdings, it may take the case.