

MEMORANDUM

Office of the City Attorney

070117
Phone: 334-5011/Fax 334-2229
Box 46

TO: Mayor and City Commissioners

DATE: June 11, 2007

FROM: City Attorney

CONSENT

SUBJECT: Gator Lodge #67, Fraternal Order of Police and John Torres vs. City of Gainesville; Eighth Judicial Circuit, Court Case No. 2007-CA-002095

Recommendation: The City Commission authorize the City Attorney and/or Special Counsel if insurance coverage is available, to represent the City of Gainesville in the case Gator Lodge #67, Fraternal Order of Police and John Torres vs. City of Gainesville; Eighth Judicial Circuit, Court Case No. 2007-CA-002095.

On May 31, 2007, the City was served with a Summons and Petition for Declaratory Judgment and Injunctive Relief filed by Gator Lodge #67, Fraternal Order of Police, and John Torres in the Circuit Court. The Petition alleges that a Gainesville Police Department Internal Affairs investigation has continued past the time constraints contained in the contract between the City and the Fraternal Order of Police, and provided in Florida Statutes Law Enforcement Officer's Bill of Rights. The petition is seeking injunctive relief from further internal investigation of Mr. John Torres in case #IA-06-057-E.

Prepared by:

Daniel M. Nee,
Assistant Litigation Attorney

Submitted by:

Marion J. Radson,
City Attorney

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR ALACHUA COUNTY, FLORIDA

GATOR LODGE #67,
FRATERNAL ORDER OF POLICE
and JOHN A. TORRES,
Petitioners,

CASE NO.: 2007-CA-002095
DIVISION: J

v.

CITY OF GAINESVILLE,

Respondent.

A TRUE COPY
SADIE DARNELL, SHERIFF
ALACHUA COUNTY, FLORIDA
3:39 PM on the 31 Day
Served at 3:15
of _____
BY _____ As Deputy Sheriff
W

SUMMONS

THE STATE OF FLORIDA
To Each Sheriff of the State:

YOU ARE COMMANDED to serve this Summons and a copy of the Complaint, and Interrogatories in this action on the Defendant:

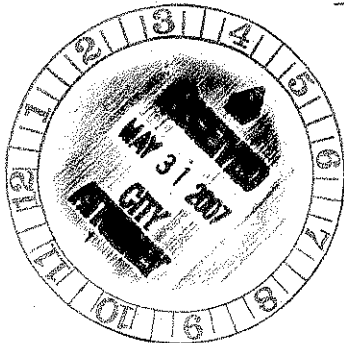
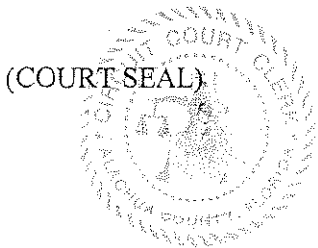
CITY OF GAINESVILLE
c/o MAYOR PEGEEN HANRAHAN
200 EAST UNIVERSITY AVE.
GAINESVILLE, FL. 32601

Each defendant is required to serve written defenses to the complaint or petition on plaintiff's attorney whose name and address is:

ROD SMITH, ESQ., 2814 SW 13th STREET, GAINESVILLE, FLORIDA, 32608

within twenty ³⁰(20) days after service of this summons on that defendant, exclusive of the date of service, and to file the original of the defenses with the clerk of this court either before service on plaintiff's attorney or immediately thereafter. If a defendant fails to do so, a default will be entered against that defendant for the relief demanded in the complaint or petition.

WITNESS my hand and the seal of said Court on 5/24 07.



J.K. "Buddy" Irby
Clerk of Circuit Court

By: Brenda D...
Deputy Clerk

COPY

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the Alachua County Court Administrator at (352) 374-3648, within 2 working days of your receipt of this summons. If you are hearing or voice impaired, call 1-800-955-8771.

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR ALACHUA COUNTY, FLORIDA

GATOR LODGE #67,
FRATERNAL ORDER OF POLICE
and JOHN A. TORRES,

CASE NO.: 2007-CA-002095

DIVISION: J

Plaintiffs,

v.

CITY OF GAINESVILLE,

Defendant.

RECEIVED BY ALACHUA
COUNTY CLERK OF COURT
DATE: 2007 may 21st 3:3

5pr

**PETITION FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF**

COME NOW the above captioned Plaintiffs, Gator Lodge #67 (hereinafter "FOP"), and John A. Torres, by and through their undersigned counsel, and sue the City of Gainesville, and in support thereof say:

PARTIES

1. At all times material hereto, FOP, a registered labor organization, in accordance with the applicable provisions of the Public Employees Relations Act, has been the certified bargaining agent for a defined bargaining unit comprised of sworn police officers and sergeants employed by the City of Gainesville Police Department and currently covered by a collective bargaining agreement.
2. At all times material hereto, John A. Torres has been a non-probationary, full time certified police officer as that term is used in FS 112.531, et seq., also known as the Law Enforcement Officers' Bill of Rights.

3. The City of Gainesville is a municipality comprised of numerous departments and agencies including the Gainesville Police Department (hereinafter "GPD"), which is a law enforcement agency as that term is used in FS 112.531, et seq.

JURISDICTION

4. This is an action for declaratory relief pursuant to Chapter 86, Florida Statutes.

5. In addition to the Declaratory Judgment Act, this Court has jurisdiction to issue injunctive relief against a law enforcement agency that fails to comply with the requirements of the Police Officers' Bill of Rights by operation of Chapter 112.534, Fla. Stat.

VENUE

6. All actions giving rise to this cause occurred in Alachua County, Florida.

CAUSE OF ACTION - COUNT I

7. In addition to the foregoing paragraphs 1 through 6, which are incorporated in this Count as if specifically restated herein, the Plaintiffs allege:

8. On November 6, 2006, GPD, by and through the actions of Lieutenant Wayne Ash, referred a complaint against Plaintiff Torres to the Internal Affairs Division (hereinafter "IA"), which is the division of GPD authorized to initiate investigations of alleged misconduct by a police officer. (See attached Exhibit "A")

9. On November 28, 2006, Plaintiff Torres was officially notified that an IA investigation had been opened and that he was to appear for an interview regarding the allegations against him on December 1, 2006 (See attached Exhibit "B").

10. On December 1, 2006, Plaintiff Torres filed a Petition for Injunctive Relief in the Circuit Court in and for Alachua County (Case No. 01-2006-CA-4781) which alleged that the scheduled interview of Plaintiff Torres was in violation of rights secured to Officer Torres by

FS 112.531, et seq. In the application for injunctive relief, Plaintiff Torres alleged that the Department had failed and/or refused to provide him with an opportunity to review the complaint and witness statements prior to subjecting him to an interrogation in violation of the provisions of the Police Officers' Bill of Rights. (See attached Exhibit "C").

11. On December 1, 2006, Circuit Judge Mark Mosley issued an Order enjoining the GPD from interviewing Plaintiff Torres until a further evidentiary hearing could be conducted. (See attached Exhibit "D")

12. On December 11, 2006, the above-referenced Injunction was dissolved by Order of Circuit Judge Toby Monaco. (See attached Exhibit "E")

13. A December 1, 2006 interview of Torres was conducted between 5:05 PM and 6:00 PM; such interview was terminated only after IA was served a copy of the Injunction issued by Judge Mosley.

14. At the time the Injunction was served and at all times thereafter, GPD has maintained that the IA investigation of Plaintiff Torres was and is "continuing". (See attached Exhibit "F", excerpt from transcript of December 1, 2006 IA interview.)

15. During the time that the GPD had opened and was conducting the IA Investigation #06-057-E, Plaintiff Torres was also the subject of an ongoing criminal investigation (GPD# 0206022956).

16. On November 11, 2006, evidence in the case was submitted to the Florida Department of Law Enforcement (hereinafter "FDLE") laboratory and marked as FDLE case #20060513892.

17. On November 27, 2006, GPD received a phone call from FDLE Senior Crime Lab Analyst Tim Petrie that the DNA from Plaintiff Torres did not match that which had been swabbed from the alleged victim.

18. On December 7, 2006, GPD was notified by the FDLE lab that evidence gathered from the victim was a direct match to that that had been provided by the alleged victim's boyfriend. At all times material herein both the criminal investigators and the IA investigators were in receipt of such information.

19. On February 21, 2007, those GPD investigators assigned to the criminal investigation were informed by Assistant State Attorney Tim Browning that the case was not prosecutable in its current form. No criminal information nor indictment was ever obtained nor was a state attorney investigation file opened or a sworn complaint filed.

20. On March 22, 2007, the GPD criminal investigation was officially closed based upon receipt of the FDLE lab analysis reports which confirmed that which GPD had already been told in November 2006.

21. On April 12, 2007, Plaintiff Torres was notified by GPD that he was required to report to IA for an interview which was conducted on April 23, 2007 and included rereading the same "Garrity" warnings that had been given to him on December 1, 2006. (See attached Exhibit "G")

22. On May 10, 2007, IA informed Plaintiff Torres that continuation of the investigation of Case #06-057-I (not the original case number assigned to this cause) "may go over the 70 day period as stated in the FOP contract". (See attached Exhibit "H")

23. GPD General Order 26.5, as revised June 2006, provides that any investigation of a major offense should be completed within 70 days and is subject to an extension of an

additional 70 days after the member is notified in writing of the extension and the reasons for it. (See attached Exhibit "I", p3.)

24. Pursuant to that General Order, an IA investigation is commenced when an officer receives the Notice of Allegation of Misconduct, which in this case was November 28, 2006.

25. Article VIII of the current Collective Bargaining Agreement between the City of Gainesville and Plaintiff FOP requires all IA investigations to be completed within 70 days of the officer receiving notice of any alleged misconduct unless extended for 70 days at the end of the initial investigative period. (See attached Exhibit "J")

26. The only extension requested to the ongoing IA investigation of Plaintiff Torres was that which was filed more than 162 days after Plaintiff Torres had been served his Notice of Alleged Misconduct.

27. GPD now maintains that the IA investigation of Plaintiff Torres is still being conducted as a continuing investigation.

28. Plaintiffs are in doubt as to their rights under the General Order and the Collective Bargaining Agreement as well as Florida law.

29. Plaintiff Torres' rights are being violated by the actions of GPD in continuing the IA investigation beyond those time periods set forth in the General Order, the Collective Bargaining Agreement, and applicable Florida law.

30. Plaintiff FOP is responsible under the Public Employees Relations Act for fair representation of each of its members and has a direct interest in the enforcement of the General Order and the Collective Bargaining Agreement and as such is an interested person under the Declaratory Judgment Act.

NOW WHEREFORE, Plaintiffs pray this Court issue an order declaring that The Notice of Extension sent by GPD on May 10, 2007 is untimely under the provisions of the General Order and the Collective Bargaining Agreement.

- (a) The IA investigation of Plaintiff Torres was required to be completed within 70 days from the date of the initial notification of alleged misconduct.
- (b) Enjoining the City from any further internal investigation in Case #IA-06-057-E or I.
- (c) Requiring the City to pay reasonable costs and fees incurred in the presentation of this cause.
- (d) Directing such other actions by the City as the Court finds are necessary and proper for the furtherance of justice.

COUNT II

31. In addition to the foregoing paragraphs 1 through 30, which are incorporated in this Count as if specifically restated herein, Plaintiffs say:

32. FS 112.5320(6) provides that an investigation of a law enforcement officer that could lead to discipline must be concluded within 180 days from the date the agency receives notice of the allegation.

33. The initial Notice of the Incident in this case was received by GPD on November 6, 2006.

34. GPD never sought to extend the original 180 day time period for the IA investigation of Plaintiff Torres, nor did the Department cease its IA investigation of Plaintiff Torres during any period of criminal investigation.

35. To date, GPD has never suspended any IA investigation under the Superseding Investigation procedures set forth in General Order 26.5.

36. More than 180 days has passed since GPD received its initial incident report alleging misconduct by Plaintiff Torres and during which it actively continued the IA investigation of Plaintiff Torres.

37. GPD cannot now extend nor continue the original internal investigation since the investigation is already beyond those time frames prescribed and provided under Florida law.

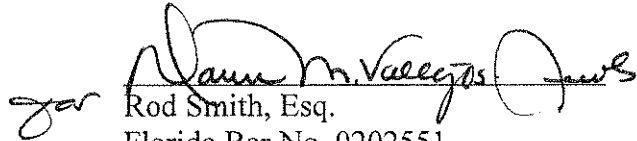
38. FS 112.534 empowers this Court to issue an injunction against any agency for failure to comply with the Law Enforcement Officers' Bill of Rights.

NOW WHEREFORE, Plaintiffs pray this Court will issue an Order enjoining the City of Gainesville and its constituent law enforcement agency, GPD, from any further internal investigation of Plaintiff Torres in Case #IA-06-057-E.

DATED this 21st day of May, 2007.

Respectfully submitted,

AVERA & SMITH, LLP


Rod Smith, Esq.
Florida Bar No. 0202551
2814 SW 13th Street
Gainesville, FL 32608
(352) 372-9999/FAX 375-2526
Attorneys for Plaintiffs