

CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION - # 09-003

TO: Joni Harris, Employee Relations Manager
FROM: Julie O. Bru, City Attorney
DATE: September 2, 2009
RE: Civilian Investigative Panel – Clarification of Legal Issues

You have requested a legal opinion on essentially the following questions:

1. WHAT IS THE DISTINCTION BETWEEN A CITY DEPARTMENT AND AN INDEPENDENT ENTITY?
2. IS THE CIVILIAN INVESTIGATIVE PANEL AN INDEPENDENT ENTITY?
3. WHAT IS THE AUTHORITY OF THE CIVILIAN INVESTIGATIVE PANEL TO DETERMINE PERSONNEL, PAY, OR BUDGETARY MATTERS?
4. WHAT IS LEGALLY REQUIRED TO APPOINT AN EXECUTIVE DIRECTOR OF THE CIVILIAN INVESTIGATIVE PANEL?
5. DOES THE APPOINTMENT OF AN *INTERIM* EXECUTIVE DIRECTOR FOR THE CIVILIAN INVESTIGATIVE PANEL REQUIRE CITY COMMISSION ACTION?
6. IS A CITY COMMISSION RESOLUTION NEEDED TO AUTHORIZE RETROACTIVE PAYMENT FOR THE *INTERIM* EXECUTIVE DIRECTOR?
7. WHAT ROLE DOES THE CITY MANAGER SERVE AS IT CONCERNS THE CIVILIAN INVESTIGATIVE PANEL?

Charter §51 required the City to create and establish by ordinance the Civilian Investigative Panel ("CIP"). Charter §51 provides:

Sec. 51. Civilian investigative panel.

The city commission shall, by ordinance, create and establish a civilian investigative panel to act as independent citizens' oversight of the sworn police department, to be:

(B) Advised by independent counsel who is a competent member of the Florida Bar with at least seven years membership in the Florida Bar and is generally knowledgeable in municipal law, and appointed by the panel with the approval of the city attorney and with authority to remove by the city attorney;

(C) Staffed with professional personnel including an "Independent Counsel," and operated on an annual approved budget;

(E) Authorized to:

- (1) Conduct independent investigations of police misconduct,
- (2) Review policies of the police department, and
- (3) Make recommendations to the city manager and/or directly to the police chief, to which a timely written response shall be received within 30 days.

The CIP was created and established by ordinance. The City Manager is required to provide certain assistance to the CIP. City Code §11.5-34. The CIP is also required to employ independent counsel subject to the approval of the City Attorney. The City Code provides:

Sec. 11.5-34. Administrative assistance; independent counsel.

When requested by the CIP, the city manager, city attorney, and the city clerk shall provide full cooperation and assistance; however, the city manager and city attorney are not required to attend the meetings of the CIP, except to advise the CIP, at its initial meeting, of procedural laws and regulations related to public records and the Sunshine Law. The city clerk and the city attorney may conduct annual workshops to further inform the CIP of the aforementioned laws and regulations. An attorney-at-law admitted to practice in Florida for at least seven years shall be employed by the CIP as independent counsel, subject to the approval of the city attorney and the authority of the city attorney to remove the independent counsel from employment.

The CIP operates on an annual budget that must be submitted in a form acceptable to the City Manager and approved by the City Commission. The City Manager assigns personnel to assist in the preparation of the budget and provide administrative support to the CIP. In addition, the CIP is permitted to employ an executive director, and such appointment and the terms and conditions of employment are subject to the approval of the City Commission. The City Code further provides:

Sec. 11.5-35. Review and approval of annual budget.

(a) Effective immediately, the CIP shall establish a fiscal year that coincides with that of the city. The CIP shall submit to the city commission, in a form acceptable to the city manager, and no later than April 1 preceding the commencement of each fiscal year, a CIP budget request pertaining to its

functions. The city manager shall assign appropriate personnel to assist in the preparation of the budget for the CIP and provide administrative support to the CIP. The city manager shall present the total estimated dollar appropriations necessary to cover expenses incurred by the CIP during the execution of its duties to the city commission for its review and consideration in the annual budget of the city. Nothing contained herein shall be construed to prohibit the CIP from submitting a supplemental budget and appearing before the city commission to request approval.

(b) No expenditure shall be made in any given year without approval by the city commission of the CIP budget for that year and all expenditures shall comply with city procedures for acquisition of goods and services.

(c) No provision contained in this chapter shall be construed to violate the Anti-Deficiency Act, as set forth in sections 18-500 through 18-503 of this Code.

(d) At the conclusion of one year from the effective date of this Chapter, the members of the CIP may appoint an executive director of the CIP. Such appointment and the terms and conditions of the director's employment shall be subject to approval by the city commission. The director shall take an oath before entering upon any duties.

ANALYSIS

QUESTIONS 1 AND 2

WHAT IS THE DISTINCTION BETWEEN A CITY DEPARTMENT AND AN INDEPENDENT ENTITY?

IS THE CIVILIAN INVESTIGATIVE PANEL AN INDEPENDENT ENTITY?

The City Departments are set forth in City Code Chapter 2, Article IV. The CIP is not included in the list of City Departments. Thus, the CIP is not considered a "Department" by the City.

The City Charter and Code defines the parameters of the CIP. The CIP is characterized as "independent" to the extent that it functions as an "independent citizens oversight of the sworn police department" Charter §51(B). However, the CIP is not an "independent entity" as it lacks "independence" in other respects. The CIP is clearly an advisory body by language whereby it makes recommendations to the City Manager and the Police Chief. The City Manager provides personnel to provide administrative support to the CIP. The CIP's budget must be submitted in a form acceptable to the City Manager, and the budget must be approved by the City Commission. The CIP may appoint an executive director, but the appointment, and the terms and conditions of employment, are subject to approval by the City Commission. The CIP must employ an attorney, but the attorney is subject to the approval of the City Attorney, and the City Attorney retains the right to terminate the CIP attorney. Thus, the CIP cannot truly be characterized as an "independent entity."

The CIP is more in the nature of an advisory board. Under the City Code, "The term "board" is defined to include every agency, authority, advisory board, regulatory board, quasijudicial board, semiautonomous instrumentality, committee, task force or any other citizens' group created and funded in whole or in part by the city commission." City Code §2-882. Under Florida law, "Municipal administrative boards may proceed in their official functions only as and in the manner authorized by applicable law; and all actions of such municipal administrative boards must be in accord with authority duly conferred." *City of Miami v. Rosen*, 151 Fla. 677, 683, 10 So. 307, 309 (1942); *City of Miami v. Shires*, 167 So. 2d 22, 24 (Fla. 3d DCA 1964). Hence, the authority of the CIP, as a panel, is strictly limited to the authority conferred by the City Charter and the enabling ordinance.

QUESTION 3

WHAT IS THE AUTHORITY OF THE CIVILIAN INVESTIGATIVE PANEL TO DETERMINE PERSONNEL, PAY, OR BUDGETARY MATTERS?

Pursuant to Charter §51, the CIP was to be "Staffed with professional personnel including an 'independent counsel,' and operated on an annual approved budget." Under Charter §51 and City Code §11.5-34, the CIP must employ an "independent attorney." The attorney is "subject to the approval of the city attorney and the authority of the city attorney to remove the independent counsel from employment." City Code §11.5-34. Pursuant to City Code §11.5-35(d), the CIP may employ an executive director. The terms and conditions of the executive director's employment "shall be subject to approval by the city commission."

Under City Code §11.5-35(a), "The city manager shall assign appropriate personnel to assist in the preparation of the budget for the CIP and provide administrative support to the CIP." City Charter §15 provides that "The city manager shall be the head of the administrative branch of the city government." Section 15 further provides "The city manager shall be responsible for the administration of all units of the city government under the city manager's jurisdiction." Pursuant to City Charter §16, the "powers and duties of the city manager shall be to ...(c) Exercise control over all departments and divisions created herein or that may be hereafter created by the city commission."

Regarding the budget, "The CIP shall submit to the city commission, in a form acceptable to the city manager, and no later than April 1 preceding the commencement of each fiscal year, a CIP budget request pertaining to its functions. The city manager shall assign appropriate personnel to assist in the preparation of the budget for the CIP and provide administrative support to the CIP. The city manager shall present the total estimated dollar appropriations necessary to cover expenses incurred by the CIP during the execution of its duties to the city commission for its review and consideration in the annual budget of the city." City Code §11.5-35(a). The CIP may also submit a supplemental budget for approval by the City Commission. City Code §11.5-35(a). "No expenditure shall be made in any given year without approval by the city commission of the CIP budget for that year and all expenditures shall comply with city procedures for acquisition of goods and services." City Code §11.5-35(b).

Based on the foregoing, the CIP has no authority to determine "personnel" or "pay" as it pertains to personnel assigned by the City Manager to provide administrative support to the CIP. With regard to the executive director, the appointment and terms and condition of employment are subject to the approval of the City Commission. The appointment of the independent attorney is subject to the approval of the City Attorney. With regard to "budgetary matters," the CIP is required to submit a proposed budget in a form acceptable to the City Manager for approval by the City Commission.

QUESTION 4

WHAT IS LEGALLY REQUIRED TO APPOINT AN EXECUTIVE DIRECTOR OF THE CIVILIAN INVESTIGATIVE PANEL?

City Code §11.5-35(d) provides that "At the conclusion of one year from the effective date of this Chapter, the members of the CIP may appoint an executive director of the CIP. Such appointment and the terms and conditions of the director's employment shall be subject to approval by the city commission." Accordingly, the CIP may appoint the executive director, but the proposed appointee to the position must be approved by the City Commission. Further, the terms and conditions of employment of the executive director must be approved by the City Commission. Hence, the proposed appointment, and the terms and conditions of employment, must be presented to the City Commission for approval.

QUESTIONS 5 AND 6

DOES THE APPOINTMENT OF AN *INTERIM* EXECUTIVE DIRECTOR FOR THE CIVILIAN INVESTIGATIVE PANEL REQUIRE CITY COMMISSION ACTION?

IS A CITY COMMISSION RESOLUTION NEEDED TO AUTHORIZE RETROACTIVE PAYMENT FOR THE *INTERIM* EXECUTIVE DIRECTOR?

As stated above, City Code §11.5-35(d) provides that "At the conclusion of one year from the effective date of this Chapter, the members of the CIP may appoint an executive director of the CIP. Such appointment and the terms and conditions of the director's employment shall be subject to approval by the city commission." Thus, the appointment of an executive director, and the conditions of the director's employment, are subject to approval by the city commission.

The City Code makes no distinction between an "executive director" and an "*interim* executive director." There is no provision in the ordinance that would authorize the appointment of an "interim" or "temporary" executive director. The appointment of an executive director, for any period of time, must be approved by the City Commission.

The enabling ordinance does not address payment of "retroactive compensation" to a person performing the duties of executive director pending appointment of an executive director. If the person performing the duties was herself ultimately appointed as executive director, such a payment could be considered a term or condition of employment, which would be subject to the approval of the City Commission. Otherwise, there is no authority for payment of "retroactive compensation" to a person independent of an appointment of that person as executive director. These actions must be effectuated by resolution of the City Commission. Charter §45(d).

QUESTION 7

WHAT ROLE DOES THE CITY MANAGER SERVE AS IT CONCERNS THE CIVILIAN INVESTIGATIVE PANEL?

The City Manager has several roles concerning the CIP. The CIP is authorized to propose recommendations to the City Manager. City Code §11.5-27(5) authorizes the CIP to "propose recommendations to the city manager and police chief regarding allegations of misconduct by any sworn officer of the city police department[.]"

The CIP is also permitted, and in some instances required, to furnish reports to the City Manager. City Code §11.5-27(8) states that the purpose, powers, and duties of the CIP are to include issuing "reports to the mayor, city commission, city attorney, city manager, chief of police and the public[.]" Further, upon determination by independent counsel that an investigation may commence, or after review of the internal affairs report, the CIP may "Report its written findings and conclusions to the city manager and/or the chief of police[.]" Additionally, "Copies of minutes of all CIP meetings shall be furnished to the mayor, commissioners, city manager, city attorney and chief of police." City Code §11.5-30(c). The CIP is also required, at least annually, to provide "a report in writing to the city manager, the city commission, the chief of police and the mayor, to include statistics and summaries of citizen complaints, a comparison of the CIP's findings and conclusions with the actions taken by the chief of police, recommendations related to changes in policies and procedures and any recommended changes to this chapter." City Code §11.5-37.

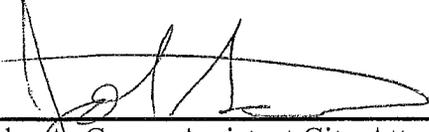
The City Manager is required to provide certain assistance to the CIP regarding personnel and presentation of the CIP proposed budget to the City Commission. Regarding administrative assistance, City Code §11.5-34 states: "When requested by the CIP, the city manager, city attorney, and the city clerk shall provide full cooperation and assistance, however, the city manager and city attorney are not required to attend the meetings of the CIP, except to advise the CIP, at its initial meeting, of procedural laws and regulations related to public records and the Sunshine Law." Thus, the City Manager is required to provide administrative assistance to the CIP when requested by the CIP.

Regarding the presentation of the proposed budget, City Code §11.5-35 provides: "The CIP shall submit to the city commission, in a form acceptable to the city manager, and no later than April 1 preceding the commencement of each fiscal year, a CIP budget request pertaining to its functions. The city manager shall assign appropriate personnel to assist in the preparation of the budget for the CIP and provide administrative support to the CIP. The city manager shall

present the total estimated dollar appropriations necessary to cover expenses incurred by the CIP during the execution of its duties to the city commission for its review and consideration in the annual budget of the city.” Therefore, the proposed budget must be submitted in a form acceptable to the City Manager. To this end, the City Manager is vested with supervision and control over the financial affairs of the City, including, but not limited to, the keeping and supervision of all accounts, the levy, assessment and collection of revenues, the custody and disbursement of city funds and monies, and the control over expenditures. Charter §27(a). The City Manager is also required to provide personnel to assist in the preparation of the budget, and to present the CIP budget to the City Commission.

PREPARED BY:

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cc: Honorable Mayor and Members of the City Commission
Pedro G. Hernandez, City Manager
Members of the Civilian Investigative Panel