IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION
CASE NO. 2018-011899-CA-01 (09)

NEAL CUEVAS,
Plaintiff,
vs.

CITY OF NORTH MIAMI,
Defendants.
_____/

PLAINTIFF'S MOTION TO RECONSIDER ORDER OF DISMISSAL WITH PREJUDICE AND/OR FOR REAHEARING

Plaintiff Neal Cuevas asks this Court to reconsider and/ or rehear the Order granting Defendant's Motion to Dismiss with prejudice, and states as follows:

1. Plaintiff's Amended Complaint (Exhibit "A") was filed pursuant to Florida's Whistleblower's Law, § 112.3187, Florida Statutes, alleging he was demoted because he wrote a whistleblower memo reporting malfeasance, gross mismanagement, and illegality on the part of the North Miami Police Department, further asserting his involvement in and cooperation with the investigation of the alleged conduct.

2. The Amended Complaint more than satisfied the requirements of Florida's Whistleblower Law, and fully satisfied the pleading requirements of the Florida Rules of Civil Procedure. The Amended Complaint pled each required element and further provided a sufficient factual basis for the Whistleblower claim.

3. The dismissal with prejudice was erroneous and contrary to Florida law.

4. The Court ignored the asserted factual allegations, and went beyond the four corners of the Amended Complaint, utilizing and considering facts and assertions that were not part of the Amended Complaint.

5. The Court improperly imposed pleading requirements and factual conditions precedent as prerequisites under to a Whistleblower claim, despite their non-existence ion the operative statute, § 112.3187, Florida Statutes.

6. The Court considered allegations not contained in the Amended Complaint concerning the plaintiff's motivations and authority for writing the memo, concluding the plaintiff wrote the memorandum without authority, despite the absence of any supporting allegation in the Amended Complaint.

7. The Court also imposed a requirement, not contained in § 112.3187, that the plaintiff must have had authority to write a whistleblower memo and report malfeasance and misconduct. This court-imposed requirement is directly contrary to the express language and entire purpose of the Whistleblower Law. The dismissal because of an erroneous belief that whistleblowers must have authorization to blow the whistle flies in the face of the remedial purpose of the Whistleblower law.

8. Page 3 of the attached dismissal hearing transcript (Exhibit "B") includes the court's finding that plaintiff's whistleblower memorandum was "an unauthorized memorandum at best."[1]

9. Page 18 of the hearing transcript further demonstrates the court's imposition of a non-statutory requirement as a condition for a Whistleblower complaint, namely that the plaintiff was required to have permission to blow the whistle and be directed to do so.

10. Transcript page 4 includes the court's acknowledgment that the plaintiff reported misconduct, including malfeasance, pursuant to §112.3187, but the court then ignored the well-pled Amended Complaint and incorporated factual assertions.

11. Plaintiff's counsel stated the following on pages 14-16 of the transcript, when responding to the court's statement that the Cuevas writing was a "memo sent to the Chief based upon his disagreement with the disposition panel's findings that he had no business even commenting on, but go ahead[ ]":

> He actually goes beyond that. I think it's the City's position that he just disagreed with some routine disposition of an IA panel. What he actually did was, in the memo, as we outline in our amended complaint, which is assumed to be true at this stage of the proceedings, he outlined multiple counts of what he reported to be perjury and false statements by sworn police officers. He outlined in his memo a conspiracy by higher-ups and sworn police officers to commit perjury and make false

[1] The November 15, 2018 hearing transcript was also filed in the record.

> statements and rig and come up with the false conclusion to support their own agenda in the City.
>
> So just to be clear, Your Honor, the memo that he wrote does not just say I disagreed with the IA finding. The memo that he wrote specifically in detail, outlined in our complaint, which is assumed to be true, he outlined multiple acts of what he believed to be perjury by sworn police officers and he explicitly accused the City of malfeasance and of misconduct in condoning false statements and rigging – engaging in a conspiracy to rig an official proceeding to frame a police officer. And what whistleblowers do – if someone writing – very few people write a memo that says whistleblower on top of it. But if a memo – if a memo from a police officer that accuses – that is sent to higher-ups, that accuses sworn police officers and a police chief of engaging in a conspiracy to commit malfeasance and a miscarriage – he specifically says they engaged in a miscarriage of justice, which included multiple acts of perjury and framing somebody in a proceeding….

12. The Court even acknowledged that the plaintiff reported malfeasance and misconduct, but took the erroneous position that a plaintiff cannot state a Whistleblower claim unless that person is "authorized" to blow the whistle. That is not and could never be a requirement for a whistleblower complaint.

13. The dismissal with prejudice improperly denied the plaintiff the opportunity to fairly state a claim, and at a minimum must be reconsidered to allow the plaintiff to re-plead a sufficient complaint. Or alternatively, the dismissal should be reconsidered and denied.

For these reasons, Plaintiff requests reconsideration and/or a rehearing of the dismissal order, with the result that the dismissal request be denied or plaintiff be allowed to replead.

Respectfully submitted,

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**IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION**

CASE NO. 2018-011899-CA-01 (09)

NEAL CUEVAS,
Plaintiff,
vs.

CITY OF NORTH MIAMI, FLORIDA,
a municipal corporation authorized
under the laws of the State of Florida,
Defendants.
_____/

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff Neal Cuevas ("Cuevas" or "Plaintiff") sues the City of North Miami, Florida ("City") for damages, demands a jury trial, and states:

INTRODUCTION

1. This is a Florida Whistleblower complaint arising from the City of North Miami's retaliatory demotion and other adverse action against former Assistant Police Chief Neal Cuevas for reporting the misconduct of senior City officials in connection with the horrific and unjustified police shooting by Officer Jonathan Aledda of unarmed behavioral therapist Charles Kinsey as he tried to coax an autistic man back into the group home he supervised. The shooting roiled the City's Police Department. Former Assistant Chief Cuevas' objected to the City's investigation and findings following the police shooting. As a direct result of his

whistleblower activities, Cuevas was demoted. His demotion followed a pattern of other adverse actions taken against him for blowing the whistle, simply because he chose to stand up and object to the pervasive cover-up by the City, its Police Department, and senior City officials.

2. The personal and community tragedy in this case is that former Assistant Chief Cuevas had realized his childhood dream of serving and protecting the public by becoming a sworn law enforcement officer in the City of North Miami. He was (and is) an exemplary officer, having achieved respect within the Police Department and in the community through his selfless dedication of public service. He rose through the police ranks to become the City's highest ranked Hispanic officer with an unblemished record as the City's longest serving police officer. On merit, Cuevas earned a senior position as an Assistant Police Chief, the second highest ranking officer in the Police Department.

3. But his sterling credentials and personal integrity were not enough to maintain his career when he discovered and reported the occurrence of material misconduct within the Police Department and senior City officials who contrived, misled, and schemed to cover-up and misdirect fault for the senseless police shooting on July 18, 2016, during which an innocent citizen assisting a special needs individual was shot by a North Miami police officer. Almost immediately, the City, its senior administrators, and its elected officials engaged in a concerted, outrageous,

and illegal pattern of due process violations, humiliation, lies, deceit, racism, and slander directed against Cuevas and others. This was done in an effort to obstruct a fair investigation of the police shooting and to cast blame for the shooting on officers who were not responsible for the police misconduct. Because of his adamant refusal to participate in the City's wrongful and illicit activities, as noted in his June 2, 2017 whistleblower memo, Cuevas was subjected to a purposeful and unlawful pattern of retaliation by City officials.

4. As a result of the retaliatory conduct by the City and its responsible officials, Cuevas, whose professional life as a police officer had always followed the path of righteousness, truthfulness, and integrity, saw his law enforcement career and reputation effectively destroyed. He is viewed with suspicion and mistrust by law enforcement officers and the public because of the City's retaliation, humiliation, and false accusations against him. This lawsuit seeks to vindicate his rights as protected by Florida law.

NATURE OF ACTION AND JURISDICTION

5. Cuevas brings this action seeking damages well in excess of $1 million and other allowable relief as a result of being subjected to adverse personnel action by the City in punishing him for having the integrity to disclose acts of illegality, misconduct, and malfeasance by City officials, and for his participation in multiple investigations of City-involved misconduct as outlined in this amended complaint.

6. Plaintiff is *sui juris*, a resident of Broward County, and an employee of the City of North Miami, Florida. He works and has his principal place of business in Miami-Dade County, Florida.

7. Defendant City of North Miami is a municipal government entity organized under the Constitution and laws of the State of Florida, and as such is an "agency" within the scope of Section 122.3187(3)(a), Florida Statutes.

8. Non-party Larry Juriga, Jr. is the North Miami Police Chief. He was first named Acting Chief in May 2017, when then-Police Chief Gary Eugene went on medical leave. Juriga continued as Acting Police Chief when Eugene was fired in June 2017, supposedly for his handling of the Charles Kinsey shooting. Juriga became Police Chief in March 2018.

9. Non-party Larry Spring is the North Miami City Manager.

10. Venue is proper in this judicial circuit because defendant North Miami is located within Miami-Dade County, Florida. All of the acts relevant to this complaint occurred within Miami-Dade County, Florida.

11. All conditions precedent to this cause of action have been met, waived, excused, occurred, or would be otherwise futile.

GENERAL ALLEGATIONS

12. For purposes of this amended complaint, Cuevas at all times was a sworn North Miami Police Officer who became the Assistant Police Chief for the

City of North Miami. He has been employed in a law enforcement capacity for the City for nearly forty-four (44) years. During the entire time of his law enforcement service, he had a well-deserved and hard-earned reputation for honesty, integrity, professional commitment, and dedicated service to protect and defend the North Miami community.

13. Cuevas was hired by the City as a sworn police officer in 1975. Through professionalism, merit, and unswerving dedication to the community, he steadily moved up the ranks to sergeant, lieutenant, major, and assistant chief. Each of these achievements were earned through hard work and dedication to his profession as a law enforcement officer and public servant.

14. Cuevas became Assistant Chief on June 26, 2016, and served in that capacity until March 5, 2018. Police Chief Larry Juriga had become Police Chief a few days before demoting Cuevas. However, during the time Juriga was Acting Chief, the City took a number of adverse personnel actions against Cuevas directly as a result of his whistleblowing activities. As soon as Juriga became Police Chief, the City, Juriga, acting through and in concert with City Manager Spring, demoted Cuevas because of his whistleblower activities of refusing to participate in the City's improper investigations of police conduct. He also "blew the whistle" on malfeasance, misconduct, and illegal actions in the City. Cuevas' whistleblower activities had long enraged Juriga.

15. Cuevas' demotion from Assistant Chief resulted from his refusal to participate in the City's ongoing misconduct. He refused to keep silent about his knowledge of the wrongdoing being committed by City officials. Cuevas was demoted because he refused to turn a blind eye to irregularities in the police department. He was retaliated against by City Manager Larry Spring, Police Chief Larry Juriga, and other senior City officials.

16. Cuevas had been the highest ranking Hispanic law enforcement officer in the history of the North Miami Police Department until March 5, 2018. As Assistant Chief in charge of the Field Operations Division and Uniform Support, Cuevas was responsible for overseeing more than 70% of the police department personnel.

17. In direct retaliation for his whistleblower activities, Cuevas' authority was undermined by then Interim Police Chief Larry Juriga, who circumvented the chain of command and issued instructions to Cuevas' subordinates without Cuevas' knowledge, deliberately keeping Cuevas out of rotation as acting chief when the Police Chief was unavailable in violation of Police Department practices and protocol. Interim Police Chief Juriga was then unable to demote Cuevas because of the opposition of the Police Chief, even though Juriga acted to do just that in retaliation for Cuevas' protected workplace disclosures. City Manager Larry Spring

publicly disparaged Cuevas' qualifications as assistant chief by stating Cuevas was unqualified and merely a "political appointment."

18. Cuevas was publicly disparaged, maligned, and marginalized at a town hall community meeting by both City Manager Larry Spring and the City Attorney in retaliation to Cuevas' whistleblowing memorandum. This town hall meeting was sponsored and publicized by the City, and included the attendance of numerous City officials in their official capacities and members of the media.

19. Cuevas became aware of corruption within the Police Department. He refused to participate in or acquiesce to it. He did not go along with the City's preferred practice of supporting the Police Department and officers at all costs, even in the face of known misconduct. Among other things, he was concerned that the Police Department had acted in an illegal cover-up of the fault and responsibility for the Kinsey police shooting. Cuevas refused to keep silent about his concerns. In his official capacity, he reviewed the Police Department Memorandum to Police Chief Gary Eugene from the Disposition Panel. Also in his official role, he analyzed the complete file concerning the North Miami Internal Affairs Investigation of Commander Emile Hollant, IA Case No. 16-06 (May 24, 2017).

20. The Disposition Panel investigated Commander Hollant in connection with the events surrounding one of the most significant and notorious acts of

misconduct in municipal history – the shooting of an unarmed black man who was merely caring for a special needs minor.

21. The Disposition Panel was obligated by Florida Law, the Police Officers Bills of Right, the North Miami City Charter, and prevailing practices and protocols, to conduct its activities fairly, impartially, and within the bounds of the law.

22. Intentional police or municipal misconduct, rigged outcomes, and false statements are acts of illegality, gross mismanagement, misconduct, malfeasance, misfeasance to the highest degree, and in conjunction with one of the most high profile crimes in City history.

23. When Cuevas reviewed the Disposition Panel memo, he found and reported both in a written and signed memo and verbally to City officials what were plainly acts of gross mismanagement, malfeasance, misconduct, and illegality on the part of City officials.

24. In both his memo and his verbal reports about the panel investigation, Cuevas blew the whistle on this pervasive misconduct. He also refused to participate in improper and illegal adverse action.

25. The Disposition Panel memo stated that the panel reached its decision "based on the Preponderance of the evidence in this case." Cuevas, in his written

and signed memo of June 2, 2017 memo (attached as Exhibit "A") alleged improper and illegal conduct on the part of the Disposition Panel:

> "The Disposition Panel did not prove any preponderance of evidence to support its findings. In fact, its findings are replete with misinformation, half-truths and blatant inconsistencies."

26. The Cuevas memo refuted the Disposition Panel memo:

> "Based on a thorough review of this file, I cannot endorse the findings of the panel. The allegation of "Obstruction of a Law Enforcement Investigation by way of False Statements" made against Commander Hollant is unequivocally NOT sustainable."

27. Cuevas also stated, among other findings and conclusions:

> "It is glaringly obvious that the NMPD Internal Affairs Disposition Panel has inexplicably ignored the findings of the State Attorney's Office in order to back up the erroneous assumptions of those unnamed "North Miami police investigators who were intent on proving that Commander Hollant was responsible for the shooting and that he lied about his involvement." And that:
> "That the panel found the allegations against Commander Hollant sustainable is an unmitigated miscarriage of justice."

28. Cuevas did not merely disagree with the Disposition Panel, but he instead affirmatively "blew the whistle" on what he observed as the wrongful framing of a senior police officer through a manipulated and rigged process devoid of evidence and legal authority.

29. The City, through its Disposition Panel and the conduct of its officials, acted in a manner evincing gross mismanagement, malfeasance, misfeasance, and wrongful (illegal) conduct. The Disposition Panel's conduct and actions were in

violation of laws, rules, regulations, and practices. The City, through the Disposition Panel, intentionally committed a "miscarriage of justice." Its misconduct constitutes a direct and intolerable obstruction of justice that is expressive of the City's illegal actions. Additionally, Cuevas "blew the whistle" on the City's lies concerning the facts in order to frame an innocent police commander for wrongdoing he did not commit – and of which he was exonerated.

30. Cuevas also "blew the whistle" in his memo on the wrongful and illegal conduct of the Disposition Panel in intentionally cherry picking evidence by knowingly relying on perjured testimony and other acts of malfeasance.

31. By officially standing in opposition to the City's illegal conduct in scapegoating a North Miami Police Commander, City officials made an affirmative decision to retaliate against Cuevas. The City did so by the concerted conduct of police employees and senior City officials to disseminate documents that contained unsubstantiated derogatory information pertaining to Cuevas via anonymous emails to the City Council, City officials, and Police Department employees.

32. The City, through its City Manager, ordered the initiation of an Internal Affairs investigation of Cuevas directly as a result of Cuevas' whistleblowing memorandum. This Internal Affairs investigation was commenced contrary to City practices, and based on Cuevas' objection to the City's wrongful determination of blame for the citizen shooting.

33. In direct retaliation for Cuevas' whistleblower memorandum, the City, in particular City Manager Spring and Police Chief Juriga, slandered and publicly humiliated Cuevas, and also illegally took adverse action against Cuevas by demoting him to a lower salary with inferior working conditions. The City illegally replaced Cuevas with a lesser qualified Haitian female officer nearly 20 years younger than Cuevas. City officials slandered Cuevas by casting him in a negative light by, among other things, the following:

a. Publicly stating that Cuevas was a "political appointment" and denigrating his qualifications as a career law enforcement officer.

b. Deliberately leaving Cuevas out of decisions and refusing to notify him of events and activities in which he should have participated, contrary to longstanding practices.

c. Intentionally undermining Cuevas' authority by issuing instructions to his subordinates without his knowledge, contrary to longstanding practices.

d. Deliberately keeping Cuevas out of rotation as acting chief when the chief was unavailable, contrary to longstanding practices and protocols.

34. Juriga and Spring intentionally published to third parties, and made public to potentially millions of people, false statements designed to punish Cuevas in retaliation for his whistleblowing activities.

35. Juriga and Spring purposely and knowingly disseminated false statements and information to third parties to have the effect of destroying Cuevas' reputation, done in retaliation for Cuevas' whistleblowing conduct. They achieved their intended effect by punishing Cuevas for being a whistleblower, and in the process intentionally harming him by denying him promotions and salary adjustments to which he was due, and removing him from his senior police position and destroying his earning potential.

36. Juriga's and Spring's actions were done in their capacity as City officials directly for and on behalf of the City. They acted knowingly, intentionally, and in bad faith, with a malicious purpose, and in wanton disregard of Cuevas's human dignity, life, safety, property, and right to employment without retaliation.

37. Juriga's and Spring's actions were done directly on behalf of the City in their capacities as responsible City officials, knowing and intending that the City was exacting retaliation and punishment for Cuevas' whistleblower conduct.

38. Under the City Charter, City Manager Spring owed Cuevas a duty of care to provide him with a safe work environment free from harassment,

unreasonable working conditions, and emotional duress. The City also owed Cuevas a duty to not retaliate against him for his whistleblower actions.

39. The City, though the actions of its City Manager, breached that duty owed to Cuevas by intentionally, recklessly, and/or negligently failing to provide Cuevas with a safe work environment free from harassment, unreasonable working conditions, emotional duress, and retaliation for whistleblower conduct.

40. The City, through the actions of its City Manager, illegally took adverse action against Cuevas by demoting him by three ranks, and one rank below his last civil service position of Lieutenant, in retaliation for Cuevas blowing the whistle. The City's demotion directly followed a pattern of retaliation that began with its deprivation of a bonus due to Cuevas, the truncation of duties and assignments to which Cuevas was entitled as Assistant Chief, and the making of false and inaccurate statements impugning Cuevas' integrity and professionalism as a law enforcement officer.

41. This City's adverse personnel action was in direct retaliation against Cuevas for his disclosures of misconduct and illegalities, as well as for his steadfast refusal to turn a blind eye to the illegalities and gross malfeasance and misfeasance within the City by City officials, including the Disposition Panel.

42. The City's demotion of Cuevas from Assistant Chief to Sergeant occurred on or about March 3, 2018. This demotion was not the first of the

adverse actions taken against Cuevas for his whistleblowing conduct. Instead, it was the culmination of an intended pattern and practice of multiple acts of retaliation that started immediately after he wrote the whistleblowing memo and continued through the demotion.

43. Subsequent to and as a direct result of his writing the memo, Cuevas was, among other acts of retaliation, subjected to an unfair, contrived, and retaliatory internal affairs investigation in violation of policy and practices.

44. Cuevas was also subjected to ongoing humiliation that altered the conditions of his employment directly as a result of his whistleblower activities.

45. Among other acts of retaliation for his whistleblower activities, the City illegally withheld Cuevas' cost of living adjustment and mandated pay increase, thus intentionally causing significant financial harm to Cuevas.

46. Cuevas was entitled to a merit increase on June 26, 2017, three weeks after he wrote his whistleblower memorandum. In direct retaliation for his memo, Cuevas' merit raise was withheld until February 2018 – eight months later, but one week before his demotion. This delay was intentionally designed to punish Cuevas for his conduct as a whistleblower.

47. The City's withholding of the pay and benefits to Cuevas was a direct act of retaliation because of his whistleblowing activities.

48. Cuevas' demotion, occurring nine months after he wrote the memo, occurred as soon as Juriga was named Police Chief, and done in direct retaliation for his whistleblower activities. Prior to that time, Juriga was only Acting Chief, and unable to demote Cuevas, who became Assistant Chief in the tenure of then-Chief Eugene.

49. City Manager Spring's decision to appoint Juriga as Chief was announced in March 2018. Within days of his appointment, Juriga retaliated against Cuevas by demoting him three ranks to Sergeant as additional punishment for his whistleblowing memo and conduct. Juriga was unable to demote Cuevas earlier because he was not yet the permanent Chief of Police.

50. In July 2017, City Manager Spring initiated an Internal Affairs Investigation against Cuevas, who was then Assistant Chief. This was done with the knowledge and assent of then-Acting Chief Juriga, both of whom intended to retaliate against Cuevas for his whistleblowing conduct. The Internal Affairs investigation was initiated in violation of practices and protocols, and was not disclosed to Cuevas.

51. The initiation of the Internal Affairs investigation by the City Manager's directive is illegal in direct violation of the North Miami Police

Department's Standard Operating Procedure regarding Internal Investigations Complaints, Counseling, and Discipline (January 16, 2013). Section V. COMPLAINT PROCEDURES: CFA 11.03, 27.01(A), ¶ C(1)(b), states with respect to complaints received, "The information will be recorded on the Initial Report – Allegation of Employee Misconduct (Appendix A)."

52. The City, including City Manager Spring, was so incensed by Cuevas' whistleblowing memo that it was withheld from public view.

53. *Biscayne Times* journalist Mark Sell directly asked City Manager Spring why those documents, the Cuevas memo in particular, were not posted on the City's website, to which Spring replied that the matter was "under investigation." Spring intentionally suggested, in another instance of retaliation, the Cuevas had engaged in conduct warranting an investigation.

54. On June 21, 2017, City Manager Spring held a City Community Council Forum, during which he distributed a City-memorandum discussing the shooting. Spring publicly denounced Police Chief Eugene and Commander Hollant.

55. Acting Chief Juriga did not notify then-Assistant Chief Neal Cuevas that this Forum was scheduled. This was intentionally done by Juriga and Spring to prevent Cuevas from attending, in direct retaliation for Cuevas' whistleblowing conduct. Cuevas, however, learned of this meeting through

residents and, in fact, did attend. Cuevas' attendance infuriated both Spring and Juriga.

56. The official public records video recording of the Forum reveals, at hour 2:06,, City Attorney Cazeau stated that all relevant documents of the Kinsey shooting and Commander Hollant's Internal Affairs investigation were available on the City's website. When an audience member asked why Cuevas' whistleblower memo was not posted, Cazeau responded:

> "The reason that memo hasn't been put out is because it's not officially part of our, um, it's not part of any of this process. Ma'am, ma'am, *PLEASE!* There is a process in all of this and we've been following the process through all of this. The way this process works is once the internal affairs investigation is over, the internal affairs package goes to three officers who review it. Once those three officers make their determination, that package then goes to the person's supervisor. In this case it would be Major Belcher. It goes through the person's chain of command. In other words, whoever the highest person in the chain of command, they get the package, it goes down to the person to make their recommendation. That's the way it's supposed to work. The only person supposed to make that recommendation on that IA investigation is the direct supervisor. That memo that you're talking about is outside the Standard Operating Procedures. It's outside the Standard Operating Procedures, it's not called for in any of the city's processes. So you can't on one side say make this a process and follow the process, follow the process, and on the other side, someone just comes out and writes whatever they want to write now here's the thing. Whether or not he has the right to do it, that that's I'm not saying he has he doesn't have the right to make up whatever he wants to say I mean the man's been in in the force for a long time, he has his opinion. But at the same time, that does not go in our procedure. So that was not the forum for it."

57. The City's withholding of the Cuevas memo from public records violates the Florida Public Records Law. Allowable exemptions from public access,

denoted in the Public Records Law, include, but are not limited to, documents that are part of a public bidding process, criminal investigation, criminal or civil litigation, data processing licensing and trade secrets, active criminal intelligence and/or investigative information, information revealing surveillance techniques, information revealing the identity of a confidential informant or source, and any information revealing "highly sensitive personal information" of a victim of a crime, including the identity of a victim of child abuse or rape, none of which apply to the Cuevas memo unless City Attorney Cazeau was intending to falsely claim an exemption because of a "criminal investigation" against Cuevas. If so, that is yet another intended retaliatory action to falsely accuse Cuevas of being the subject of a criminal investigation as a direct punishment for his whistleblowing conduct.

58. Cuevas fully cooperated with the illegal Internal Affairs investigation, even submitting to an interview by North Miami Police Department Internal Affairs Sergeant Diana Roman on July 20, 2017. Sgt. Roman informed Cuevas he was being investigated for allegations of "improper procedures relating to a memorandum you wrote on June 2, 2017, and the North Miami Police Department disciplinary process which includes (unintelligible) investigative files." Cuevas was also "alleged to have mishandled the investigative file of an open Internal Affairs investigation #16-06 [against Commander Hollant], and the information contained

therein." These statements and the Internal Affairs investigation were in direct retaliation for Cuevas' whistleblowing memorandum, and were intended to punish and intimidate Cuevas through the improper use of City power.

59. The Internal Affairs investigation was initiated as a direct result of Cuevas' whistleblowing memo that identified myriad violations of law, Police Department rules and regulations, North Miami Police Department Standard Operating Procedures, Commission for Florida Accreditation Standards (http://www.flaccreditation.org/standards.htm), and North Miami Civil Service Rules.

60. Cuevas revealed additional acts of misconduct in his capacity as a whistleblower:

61. Cuevas revealed the illegitimacy of the contrived Internal Affairs investigation against Commander Hollant:

62. The Miami-Dade State Attorney's Office reviewed and rejected a complaint initiated by City officials. The City persisted by bringing the complaint a second time for State Attorney review, requesting it be evaluated "as a courtesy" to unnamed "North Miami police investigators," per an email from Chief Assistant State Attorney Arrojo to City Manager Spring and City Attorney Cazeau.

63. In both instances, the State Attorney's Office decisively determined "that Commander Hollant did not lie, and that there was no intent by Commander Hollant to mislead or obstruct investigators or command staff officers regarding his involvement in the police shooting." This definitive determination by the State Attorney's Office incenses both City Manager Spring and Chief Juriga.

64. The State Attorney's conclusive determination represents Cuevas' assertion of a violation by the City of Section 7, North Miami Police Department General Rules and Regulations, which reads: "Members withholding information or furnishing unauthorized and/or confidential information with a view to personal gain or for any other reason shall be subject to disciplinary action."

65. The City's conduct, as described by whistleblower Cuevas also violated North Miami Civil Service Rule III, Section F(2), which reads: "No person shall willfully or corruptly make any false statement, certificate, mark, rating or report, in regard to any test, certification or appointment, held or made under the personnel provisions of this Charter or in any manner commit or attempt to commit any fraud preventing the impartial execution of such personnel provisions or of the Rules and Regulations made thereunder.

66. Cuevas pointed out that two key witnesses, Sergeant Reid and Officer Bernadeau, changed their testimony between their interviews with FDLE shortly after

the shooting and then with Internal Affairs approximately eight months after the shooting. This represents another finding by Cuevas of City misconduct that is likely illegal.

67. The Disposition Panel intentionally and wrongly claimed Commander Holland's statement to the Florida Department of Law Enforcement (FDLE) that he was present on the scene, but did not witness the actual shooting by Officer Jonathan Aledda, to be "contradictory to statements made by other officers on the scene." To back up that false contrivance, the Panel quoted Sergeant Milton Reid "And then I lost track of him because I'm focusing on the targets and I then see Hollant come back with binoculars..."

68. Sergeant Reid was well aware Commander Hollant did not initially have binoculars with him since he subsequently saw him "come back with binoculars."

69. The Disposition Panel then quoted Sergeant Reid, by taking his statement out of context, as stating that Hollant was away from the scene for "less than 30 seconds."

70. The Disposition Panel noted that Sgt. Diana Roman "reported that it would have taken approximately 1 minute and 22 seconds at a jogging pace" for Commander Hollant to retrieve his binoculars from his vehicle."

71. In light of the fact that Sgt. Reid had admitted he "lost track" of Commander Hollant while he was "focusing on the targets," unless Sergeant Reid had a stopwatch and timed Commander Hollant's jog to his vehicle and back, it would have been practically impossible to determine whether Hollant was out of his presence for 30 seconds or 82 seconds. Accordingly, either Reid was focused on the victims, as he so stated, or he was keeping his eye on Commander Hollant during the entirety of the incident, but not both.

72. Another identified discrepancy with the Disposition Panel report is the inclusion of a statement made by Officer Alens Bernadeau, who claimed that Commander Hollant "was there" for the shooting.

73. According to the FDLE investigative evidence, Officer Bernadeau and Officer Kevin Crespo were 20 feet to the south of the shooting victim, while Commander Hollant and Sergeant Reid were located 150' north of the shooting victim. The distance between Commander Hollant and Officer Bernadeau was 170 feet.

74. According to the Affidavit in Support of Arrest Warrant (beginning on page 10) sworn by FDLE Special Agent Daniel Mosquera, "Officers Bernadeau and Crespo moved tactically; leap frogging behind poles on opposite sides of the street as they moved northbound towards Mr. Soto and Mr. Kinsey."

75. The FDLE probable cause Affidavit continues: "Eventually Officers Bernadeau and Crespo positioned themselves behind poles on opposite sides of NE 14th Avenue," and "were communicating with each other as they moved from two blocks away toward the two men in the intersection." They eventually "worked their way to about 20 feet or so away" from the two men.

76. Sergeant Reid and Officer Bernadeau violated Section 44, North Miami Police Department General Rules and Regulations, which reads: "Members of the Police Department shall not make false official reports, or knowingly enter or cause to be entered in any Police Department books or records any inaccurate, or false information.

77. In addition, they violated Florida Statute §837.02, Perjury in official proceedings, which reads:

> (1) Except as provided in subsection (2), whoever makes a false statement, which he or she does not believe to be true, under oath in an official proceeding in regard to any material matter, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (2) Whoever makes a false statement, which he or she does not believe to be true, under oath in an official proceeding that relates to the prosecution of a capital felony, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (3) Knowledge of the materiality of the statement is not an element of the crime of perjury under subsection (1) or subsection (2), and the defendant's mistaken belief that the statement was not material is not a defense.

78. Cuevas's memo cited material inconsistencies in the witness testimony.

79. Based on Cuevas' memo, Det. Gaucio violated Section 44, North Miami Police Department General Rules and Regulations, which reads: "Members of the Police Department shall not make false official reports, or knowingly enter or cause to be entered in any Police Department books or records any inaccurate, or false information.

80. In addition, Det. Gaucio violated Florida Statute §837.02, Perjury in official proceedings, which reads:

> (1) Except as provided in subsection (2), whoever makes a false statement, which he or she does not believe to be true, under oath in an official proceeding in regard to any material matter, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (2) Whoever makes a false statement, which he or she does not believe to be true, under oath in an official proceeding that relates to the prosecution of a capital felony, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (3) Knowledge of the materiality of the statement is not an element of the crime of perjury under subsection (1) or subsection (2), and the defendant's mistaken belief that the statement was not material is not a defense.

81. Cuevas' demotion and the other adverse action taken against him was and is wrongful and in violation of the City Charter.

82. Cuevas retained the undersigned attorneys, and said lawyers are entitled to the recovery of their reasonable attorneys' fees and costs pursuant to Florida Statutes § 112.3187.

COUNT I
VIOLATION OF § 112.3187, FLORIDA STATUTES
(Against Defendant CITY)

83. Plaintiff incorporates paragraphs 1 through 82 as if fully set forth herein.

84. The City of North Miami is an agency, a term defined by § 112.3187(3)(a), Florida Statutes.

85. Plaintiff was, at all times material, an employee as that term is defined by § 112.3187(3)(b), Florida Statutes.

86. The City of North Miami took adverse personnel action against the Plaintiff, as that term is defined by § 112.3187(3)(c), Florida Statutes.

87. The action taken against Plaintiff included demotion, and loss of titles, positions, reduced compensation, and benefits within the City.

88. The actions taken by the City were prohibitive under §112.3187(4), Florida Statutes.

89. The prohibitive actions were taken directly as a result of an in retaliation to Plaintiff disclosing information, as defined by § 112.3187(5)(a) & (b), Florida Statutes.

90. On June 2, 2017, the Plaintiff disclosed acts and suspected acts of gross management, malfeasance, misfeasance, gross waste of public funds, and illegal conduct committed by employees and agents of the City of North Miami.

91. The defendants took several retaliatory steps directly in response to Plaintiff's whistleblower memorandum that culminated in Plaintiff's demotion. Three weeks after issuance of the whistleblower memorandum, the City withheld a merit increase due to the Plaintiff. Five days later, on July 1, 2017, the City clandestinely and illegally initiated an Internal Affairs Investigation against Plaintiff. These and the other retaliatory actions described in this complaint caused, supported, led to, and culminated in the Plaintiff's demotion.

92. Plaintiff participated in investigations and other inquiries conducted by agencies of the local, state, and federal government as defined in §112.3187(7), Florida Statutes.

93. Plaintiff filed written and signed complaints disclosing information enumerated in § 112.3187(5), Florida Statutes and to parties and entities enumerated in § 112.3187(6), Florida Statutes.

94. Plaintiff refused to participate in adverse actions prohibited by § 112.3187, Florida Statutes.

95. Plaintiff refused to participate in unethical, illegal, and inappropriate violations of federal, state, and local laws, rules, regulations, and policies, and disclosed to City officials and officers such violations and misrepresentations to City and state officials.

96. For these reasons, Plaintiff requests immediate reinstatement to his position as Assistant Chief, together with reinstatement to his former position, with full pay including back pay and front pay, benefits, compensation, seniority rights, any lost income, compensatory damages, and all other relief deemed appropriate. Plaintiff also seeks immediate payment of his attorney's fees and costs.

DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury for all issues so triable as a matter of law.

Dated: July 20, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This document was filed using the State of Florida's ePortal Filing System and was served via email through the State of Florida's ePortal Filing System on July 20, 2018 to the following: **Michael Kantor, Esq**., mkantor@wsh-law.com and falonso@wsh-law.com, **Eric P. Hockman, Esq**., ehockman@wsh-law.com and szavala@wsh-law.com, and **Brett J. Schneider, Esq.**, bschneider@wsh-law.com and falonso@wsh-law.com, counsel for Defendant City of North Miami, Weiss Serota Helfman Cole & Bierman, P.L., 200 E. Broward Blvd., Suite 1900, Ft. Lauderdale, FL 33301; and **Alan J. Kluger, Esq,** akluger@klugerkaplan.com, **Todd A. Levine, Esq.,** tlevine@klugerkaplan.com, **Ryan Bollman, Esq.,** rbollman@klugerkaplan.com, counsel for former Defendants Juriga and Spring.

By: *S/ Benedict P. Kuehne*
BENEDICT P. KUEHNE

To:	Police Chief Gary Eugene	**Date:**	June 2, 2017
	Assistant Chief Neal Cuevas	**Subject:**	IA Investigation Case No. 16-06
From:	AC Neal Cuevas		
Distribution:			

I have reviewed the North Miami Police Department Memorandum dated May 24, 2017 to Police Chief Gary Eugene from the Disposition Panel regarding the Internal Affairs Investigation of Commander Emile Hollant, Case No. 16-06.

Paragraph I(B) Disposition, states that the Panel made its decision "based on the preponderance of the evidence in this case."

The Cornell University School of Law, however, defines **"preponderance of evidence"** as: **"A requirement that more than 50% of the evidence points to something."**

Accordingly, the Disposition Panel did not prove any preponderance of evidence to support its findings. In fact, its findings are replete with misinformation, half-truths and blatant inconsistencies.

As such, the Miami-Dade State Attorney's Office, on two separate occasions, ruled **"that Commander Hollant did not lie, and that there was no intent by Commander Hollant to mislead or obstruct investigators or command staff officers regarding his involvement in the police shooting."**

Therefore, I cannot go against the State Attorney's ruling, and I cannot endorse the findings of the Disposition Panel.

First and foremost, it must be noted for the record that the Miami-Dade State Attorney's Office initially reviewed a complaint, and a second time "as a courtesy" to unnamed "North Miami police investigators," per an email from Chief Assistant State Attorney Jose J. Arrojo to City Manager Larry Spring and City Attorney Jeff Cazeau.

In both instances, the State Attorney's Office decisively determined **"that Commander Hollant did not lie, and that there was no intent by Commander Hollant to mislead or obstruct investigators or command staff officers regarding his involvement in the police shooting."**

In his Close-Out Memo dated August 2, 2016, Deputy Assistant State Attorney Arrojo emphatically stated that **"at best, the allegation that he provided inconsistent statements to investigators or command staff officers appears to have been the result of simple miscommunication."**

Ironically, if the Disposition Panel was concerned about a "preponderance of evidence," they need look no further than the final decision by the State Attorney's Office that Commander Hollant committed no wrongdoing.

It is glaringly obvious that the NMPD Internal Affairs Disposition Panel has inexplicably ignored the findings of the State Attorney's Office in order to back up the erroneous assumptions of those unnamed "North Miami police investigators" who were intent on proving that Commander Hollant was responsible for the shooting and that he lied about his involvement.

That this Panel found the allegations against Commander Hollant sustainable is an unmitigated miscarriage of justice.

For one thing, the Disposition Panel inexplicably chose specific portions of witness statements that fit a predetermined outcome, which was to find fault with Commander Hollant. At the same time, this Disposition Panel omitted, and outright ignored, crucial statements made by witnesses and yourself that coincided with the State Attorney's findings that Commander Hollant committed no wrongdoing.

When interviewed by the Florida Department of Law Enforcement (FDLE), Commander Hollant truthfully stated that he was present on the scene, but **did not witness the actual shooting by Officer Jonathan Aledda.**

The Panel noted that "these statements are contradictory to statements made by other officers on the scene." To back up that theory, the Panel quoted Sergeant Milton Reid, who stated in his interview **"And then I lost track of him because I'm focusing on the targets and I then see Hollant come back with binoculars..."**

By his own admission, Sergeant Reid was well aware that Commander Hollant did not initially have binoculars with him since he subsequently saw him "come back with binoculars."

In the very next paragraph of the Memorandum, however, the Panel quoted Sergeant Reid as stating that Hollant was away from the scene for "less than 30 seconds."

In an apparently vain attempt to corroborate Reid's statement, the Panel then noted that Sergeant Diana Roman "reported that it would have taken approximately 1 minute and 22 seconds at a jogging pace" for Commander Hollant to retrieve his binoculars from his vehicle."

In light of the fact that Sergeant Reid had already admitted that he "lost track" of Commander Hollant while he was "focusing on the targets," unless Sergeant Reid had a stopwatch and timed Commander Hollant's jog to his vehicle and back, it would have been practically impossible for him to determine whether Hollant was out of his presence for 30 seconds or 82 seconds. Accordingly, either Reid was

focused on the victims, as he so stated, or he was keeping his eye on Commander Hollant during the entirety of the incident, but not both.

Another major problem with the Disposition Panel's report is the inclusion of a statement made by Officer Alens Bernadeau, who claimed that Commander Hollant "was there" for the shooting.

According to the evidence provided by the FDLE after its investigation of the shooting, it was determined that Officer Bernadeau and Officer Kevin Crespo were located 20 feet to the south of the shooting victim, while Commander Hollant and Sergeant Reid were located 150 north of the shooting victim. The distance between Commander Hollant and Officer Bernadeau was 170 feet.

According to the Affidavit in Support of Arrest Warrant (beginning on page 10) sworn by FDLE Special Agent Daniel Mosquera, "Officers Bernadeau and Crespo moved tactically; leap frogging behind poles on opposite sides of the street as they moved northbound towards Mr. Soto and Mr. Kinsey."

The Affidavit continues, "Eventually Officers Bernadeau and Crespo positioned themselves behind poles on opposite sides of NE 14th Avenue," and "were communicating with each other as they moved from two blocks away toward the two men in the intersection." They eventually "worked their way to about 20 feet...20 feet or so away" from the two men.

In fact, there are two key lines of questioning noted In Officer Bernadeau's interview with Detective Michael Gaudio on the day of the shooting, July 18, 2016.

First:

> **Question:** Okay. You see any officers north of you, north of the subject?
>
> **Answer:** Yes. They we – as I'm saying, it wasn't too much of me seeing officers, I seen a bunch of marked police vehicles, I don't – like.

Second:

> **Question:** Okay, but you don't know which (unintelligible)?
>
> **Answer:** I'm not – who was who, was ...
>
> **Question:** Okay. Okay. And then what happened?

Bernadeau testified that he was moving from pole to pole to get a better visual. **"And I was trying to do that and I heard two shots."**

In contradiction to his own words, when Officer Bernadeau was interviewed by internal affairs on February 14, 2017, he testified:

> **Question:** When you see him there is it prior to the shooting or after the shooting?

Answer: No, it – it's – it was – it was prior to and after. After the shooting – he – he was on the scene the whole time – prior to and after he was there.

Question: And based on what you saw – based on the position that you were in – the position that Commander Hollant was in and the timing of what you're – you have described do you believe that Commander Hollant witnessed the actual shooting?

Answer: I mean I believe he should have from – from his – from his – his – his angle but **I'm not sure** if – if at that time he was looking or not, **but I think he should have.**

Clearly, Officer Bernadeau testified that he saw Commander Hollant "prior to and after" the shooting, but he never claimed he saw Hollant **during** the shooting.

This Disposition Panel relied solely on Officer Bernadeau's response, "Yeah, he was there," when questioned if Commander Hollant was "there for the shooting," yet they deliberately omitted that Bernadeau already testified only July 18, 2016 that he could not identify any officers, and only "a bunch of marked police cars "on the scene up until the moment of the shooting.

Furthermore, Officer Bernadeau's belief that Commander Hollant "should have" witnessed the shooting has absolutely no bearing on whether Hollant did or did not, in fact, **witness the shooting**.

I find it patently ludicrous that this Disposition Panel relied on Officer Bernadeau's claim that Hollant **"should have"** witnessed the shooting as he was leap frogging between, and positioning himself behind, poles a distance of 170 feet from where Hollant was located, and focused on the perceived threat before him.

It is impossible to fathom that Bernadeau had a clear and concise knowledge of what Commander Hollant may or may not have witnessed considering that he was at least 170 feet away from Hollant and allegedly focused solely on the victim, and at the same time, facing a potential threat of being in the line of fire.

The testimonies of Sergeant Reid and Officer Bernadeau, which the Disposition Panel obviously cherry-picked to prove their point, are simply not credible, nor do they rise to the level required for a "preponderance of evidence."

Sergeant Reid already admitted he **"lost track"** of Hollant when he went to get his binoculars, and Bernadeau claimed he saw Hollant before and after the shooting, but not during the actual shooting.

Neither of them could state with any degree of certainty that Hollant witnessed the shooting. And yet, this Panel is basing its decision on their ambiguous testimony.

Other individuals interviewed by internal affairs also claim they saw Commander Hollant before and/or after the shooting, but not one person interviewed was able to state that Hollant witnessed the shooting.

The Panel also noted that when shooting team lead investigator Detective Michael Gaudio arrived at the scene, and asked Commander Hollant if he was a witness, Gaudio stated that Hollant answered, "No, no, Mikey. I just got here."

In fact, in his first IA interview on February 2, 2017, Detective Gaudio stated, "I spoke with Milton, Sergeant Reid, who was on the scene. **I asked him if he saw anything**. He told me what he saw and that he'd seen the shooting."

At no time did Reid tell Gaudio that he saw Commander Hollant witness the shooting.

Interestingly, in his testimony under oath to the FDLE, when Commander Hollant was asked if he ever spoke with Detective Gaudio, he said he did not.

In fact, not one individual interviewed by either the FDLE or the internal affairs investigators would confirm that they witnessed or even **overheard any conversation** between Commander Hollant and Detective Gaudio.

The panel erred in not corroborating Detective Gaudio's statement.

Furthermore, when Commander Angel Rivera was interview by IA, he stated that he asked Commander Hollant, "Can you name one person who you told you were a witness or a possible witness?"

Had Commander Rivera referred to his own Crime Scene Entry Sheet, he would have seen that Commander Hollant's name was the 7th on the list and that his "time in" was 1712.

The Panel notes that "the North Miami report for the shooting was missing relevant information since Commander Hollant did not identify himself as a witness."

Established police procedure is such that every single person at the scene of an incident is considered a witness. Since Commander Hollant never denied being present at the scene, he was not required to "identify himself a witness." His physical presence at the scene, combined with his transmissions over the police radio, was proof enough that he was a witness.

Even more crucially, it's apparent that neither Detective Gaudio nor Sergeant Rivera referred to the North Miami Police Department's Crime Scene Entry Sheet, which clearly reflects Commander Hollant as being present on the scene. Had Gaudio and Rivera done their due diligence as experienced investigators, they would have noticed this entry, and known or surmised he was, in fact, present at the scene before and after the shooting and, therefore, a witness.

Nineteen individuals who were interviewed by internal affairs, including myself, all testified that they did not see or hear Commander Hollant speak to either yourself or Detective Gaudio. These individuals are: Sergeant Reyes, Sergeant Brooks, Officer Laguerre, Detective Tovar, Detective Perez, Detective Castro, Sergeant Zuniga, Officer Veillard, Major Cardona, Commander Estrugo, Commander Rivera, Commander Fishel, Sergeant Reid, Officer Requejado, Officer Buissereth, Officer Crespo, Officer Llerena, and Officer Joachim.

Sergeant Mesidor saw Detective Gaudio approach Commander Hollant, but did not hear them converse. Mesidor never saw Hollant speak with Eugene. Only Assistant Chief Juriga heard Eugene speaking to Hollant.

More importantly, **none of these individuals testified that they saw Commander Hollant witness the shooting.**

According to the Miami-Dade State Attorney's Office, Commander Hollant's statement that he **did not witness the actual shooting,** is true and correct, and I wholeheartedly agree.

For the purposes of this investigation, Hollant is a "witness" by virtue of the fact that every law enforcement officer present at the scene of a major incident is considered to be a witness.

This Disposition Panel claims that "investigative personnel stated during their IA interviews that if Commander Hollant was identified as a witness, he would have been separated and a statement would have been taken from him."

Interestingly, "investigative personnel" had no problem with the shooter, Jonathan Aledda, being driven home by Sergeant Milton Reid, both of whom were witnesses to the shooting.

Although Commander Hollant was a witness (as defined by Black's Law Dictionary) at the scene of the incident, he has consistently stated from the very beginning that **he was not an eyewitness to the shooting.**

According to Black's Law Dictionary, the accurate definition of **"witness"** is **"a person who has knowledge of an event."**

An **"eyewitness,"** on the other hand, is defined as **"a party that testifies about what they saw."**

As such, Commander Hollant was a witness at the scene of the shooting, but **he was not an eyewitness.**

The Disposition Panel concluded that there was a preponderance of evidence to sustain the allegations made against Commander Hollant.

However, I see **absolutely no preponderance of evidence** that Hollant was an eyewitness to the shooting. He never once claimed that he had not been present at the scene, but he was adamant that he **did not** witness the actual shooting.

In fact, according to testimony provided by retired Major Trevor Shinn, when he heard Commander Hollant's voice on the audio recording, he and Assistant Chief Juriga questioned you about Hollant's statement to you the previous evening. Major Shinn stated that you asked Hollant if he was a witness, and you claim Hollant responded, "No, I had left – I had left to go to my car, I wasn't a witness."

Everyone present knew that Commander Hollant was at the scene. This is obvious. Statements by alleged witnesses such as "he must have seen" is not the same thing as "I know he saw."

The declaration that there is a "preponderance of evidence" by this Disposition Panel, without irrefutable evidence to back up that declaration, is meaningless, baseless and completely without merit.

Furthermore, there is absolutely no proof given in this report to contradict Commander Hollant's **sworn testimony** given to the Florida Department of Law Enforcement and the Miami-Dade State Attorney's Office affirming that **he did not witness the actual shooting**.

As I initially stated above, based on my thorough review of this file, I cannot endorse the findings of this panel. The allegation of "Obstruction of a Law Enforcement Investigation by way of False Statements" made against Commander Hollant is **unequivocally NOT sustainable.**

I strongly recommend that you rightly direct this Disposition Panel to revisit the evidence provided to it, and reconsider its irrational conclusion.

I respectfully request that my Memorandum to you be made a permanent record to this file.

Appendix:

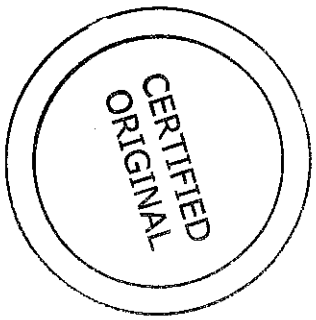
Cornell University of Law Dictionary, "Preponderance of evidence:" https://www.law.cornell.edu/wex/preponderance_of_the_evidence

Black's Law Dictionary, "Witness:" http://thelawdictionary.org/witness-n/http://thelawdictionary.org/

Black's Law Dictionary, "Eyewitness:" http://thelawdictionary.org/eyewitness/

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA
CIVIL DIVISION
No. 2018-0118899-CA-01.

NEAL CUEVAS,
Plaintiff,
vs.
CITY OF NORTH MIAMI,
LARRY JURIGA, and
LARRY SPRING,
Defendants.
_____/



Dade County Courthouse
73 West Flagler Street
Courtroom 1500
Miami, Florida
Thursday, November 15, 2018
9:00 a.m. - 10:15 a.m.

The above-entitled cause came on for Hearing before The Honorable Dennis Murphy, Circuit Judge, pursuant to notice.

APPEARANCES:

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THE COURT: All right. We are here on Neal Cuevas versus City of North Miami, 2018-11889, City's motion to dismiss the plaintiff's amended complaint.

Go ahead.

MR. KANTOR: Good morning, Your Honor. Michael Kantor here on behalf of the City of North Miami. I think you remember us from the last time we were here on the motion to dismiss original complaint --

THE COURT: Yes.

MR. KANTOR: -- so I'll be very brief with background information. This case is still about one bad cop seeking whistleblower protection because he stuck up in the termination of another bad cop. This all arises from a police-involved shooting in July of 2016. The ranking officer on the scene was Emile Hollant. The Internal Affairs Department conducted an investigation and found that Mr. Hollant had engaged in numerous instances of significant misconduct. Mr. Cuevas wrote a memorandum disagreeing with the Internal Affairs Division's findings.

THE COURT: An unauthorized memorandum at best.

MR. KANTOR: Correct, Your Honor.

Absolutely. Mr. Cuevas was not a part of the disposition panel for the Internal Affairs Department. He inserted himself into that process and wrote this memorandum basically disagreeing with the way Internal Affairs --

THE COURT: Making all these bold allegations about mismanagement and lying and this, that, and the other with no basis.

MR. KANTOR: He certainly uses plenty of colorful rhetoric about a miscarriage of justice, that's a direct quote. And he also accuses Internal Affairs of cherry picking from the evidence. That's in Paragraphs 29 and 30 of the complaint, and it's a reference as well to the memorandum itself, which is now attached to the complaint.

The first time we were here on the motion to dismiss we argued that Your Honor should look at the memorandum itself in addition to the complaint. Mr. Kuehne insisted that that would be inappropriate because it wasn't actually attached to the complaint. Your Honor dismissed and directed them to attach it. Now it is attached, so we can consider the full scope of the facts here, both the allegations in the complaint and the memorandum itself.

Again, the memorandum says nothing new.

Mr. Cuevas simply disagreed with the Internal Affairs Department's conclusions. He argued that they did not properly reach their conclusions by a, quote, "preponderance of the evidence." He pulled quotes from the Cornell Law Dictionary about what preponderance of the evidence means, very admirably, you know, researched there, but his memorandum simply does not constitute a whistleblower protected activity.

Florida Statute 112 is very clear about what constitutes a whistleblower protected disclosure, and that's a disclosure of a violation of a law, rule, or regulation, or acts of gross mismanagement, misfeasance or malfeasance. And the statute clearly defines gross mismanaged as a pattern of abuses, a pattern of misconduct. And here, even if Mr. Cuevas was correct that he could get whistleblower status simply because he disagreed with an employment decision that he felt they should have gone a different way on it, he doesn't allege anything like a pattern. All he says is this happened one time.

This simply is not a whistleblower protected disclosure and that is reason one why the complaint should be dismissed with prejudice this

time around.

Reason two is that the plaintiff also fails to establish a causal nexus between the allegedly protected disclosure and the alleged adverse employment action.

THE COURT: Given a nine-month separation in time.

MR. KANTOR: Exactly, Your Honor. Thank you.

THE COURT: Okay.

MR. KANTOR: In the amended complaint they added a few new allegations to try and overcome that delay, that nine-month separation of time. First they now argue that Chief Juriga waited those nine months because he couldn't demote Mr. Cuevas any sooner. The fact of the matter is, Chief Cuevas (sic) fired Mr. Hollant way back when this all was happening. So even though Chief Cuevas (sic) was acting as acting chief at the time, he still had authority to take employment actions, he still had authority to --

THE COURT: Not Cuevas, you mean Chief --

MR. KANTOR: Chief Juriga.

THE COURT: Juriga.

MR. KANTOR: I'm sorry if I misspoke.

There's a few different names here.

THE COURT: Yeah.

MR. KANTOR: I've been living this case long enough, I should have them straight, but, you know --

MR. PIZZI: Cuevas didn't fire anybody.

MR. KANTOR: So Chief Juriga fired Mr. Hollant and nine months later Mr. Cuevas was demoted. So there's no merit to the argument that Chief Juriga could not have demoted Juriga sooner -- could not have demoted Cuevas sooner, excuse me, if he had wanted to. If this had been retaliatory it would have been much closer in time.

The next new argument that they add in the amended complaint is that he was retaliated against because the City opened an IA investigation into him, into Mr. Cuevas. Well, that's not a materially adverse action as defined by the statute, by the Florida Whistleblower Act. A materially adverse action is one that affects the terms and conditions of employment such as a person's pay, a person's rank. So a demotion would be a materially adverse action, the problem is that didn't happen until nine months later. The IA investigation is not an adverse action.

Next, they allege that Mr. Cuevas's cost of living adjustment was delayed, but they admit that a few months later he did receive his cost of living adjustment. It's a clerical error, it got fixed, and they admit that in the amended complaint. Again, not an adverse action.

The only adverse action they are left with is the demotion. They are stuck with the problem that happened nine months later. The case law is very clear that a delay of as much as three months would be too much to establish that causation element of a whistleblower claim. So we've got the fact that the whistleblower -- the alleged memorandum is not a protected disclosure under the Whistleblower Act, and we've got the fact that they have not satisfactorily alleged causation.

THE COURT: Okay. Mr. Kuehne.

MR. KUEHNE: This is not a case about a bad cop protecting another bad cop. The City continues to claim that, but it's not a factual allegation in the complaint. This is a good cop with a long history of service documented in the complaint -- alleged in the complaint, who identified misconduct on the part of the City. The City then in its effort, alleged in the complaint, to cover up a bad

shooting of an innocent civilian engaged in retaliatory conduct directed at Cuevas.

What the City did with Hollant is immaterial to this case, although Hollant claimed in a filed lawsuit, federal court lawsuit that he was the victim of improper conduct by the City. The City's assertion that it is simply responding to one bad cop protecting another bad cop is not to be considered in this motion to dismiss because it's not a part of any aspect of this case whatsoever. That may be a disputed fact and the City's reference to such assertions in its arguments suggest that this case needs factual determination.

With regard to the two bases sought in the motion to dismiss. First, this is not whistleblower protected activity, and second, there's no causal connection, we've addressed both in the response to the motion. The City flatly is using the wrong part of the statute to defend its indefensible position. The statute -- the whistleblower statute says that statutorily protected expression includes, among others, a violation of a law or an act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual fraud or abuse, and gross neglect of duty.

We have asserted in the complaint, the amended complaint, precisely as the Court had identified, specific facts constituting each of those assertions, misfeasance defined as the improper act of doing an act that a person might lawfully do. So it does involve potentially the execution of lawful authority, but misfeasance, the improper doing. Malfeasance, the doing of an act which a person ought not to do at all. None of those factors for whistleblower involves the City's assertion of -- neither of those involve the City's assertion on which it relies completely of a continuous pattern of managerial abuses. That involves only the factor of gross mismanagement, one of the several assertions for protected -- a protected whistleblower expression.

And we have set out in our complaint, even on that item, a regular occurring over the course of nine months pattern of abuses that satisfies the legal requirement for setting out the cause of action for a whistleblower with regard to the protected activity. It does not matter and the City is flatly wrong when the City says lawful conduct cannot be part -- a challenge of lawful conduct cannot be a part of protected activity.

In fact, as I mentioned, the statutory definition says the improper doing of an act which a person might lawfully do. And in our amended complaint we've alleged a series of actions on the part of the City that are improper, that are misfeasance, malfeasance, and we believe gross negligence as set out in the complaint. And the City's suggestion that certain things the City can do don't give rise to a whistleblower action is flatly belied by the cases we've cited and by the statutory definitions under the Whistleblower Act.

It is not a determination on a motion to dismiss whether the employee was correct or incorrect about identifying perceived wrongs. That is a factual determination as long as the employee in a timely manner, and here there is no suggestion it was not done timely, did, in fact, engage in protected expression. Here he did. That satisfies the first response to the City's motion to dismiss.

We have identified with factual development the statutorily protected expression of misfeasance, malfeasance, gross negligence, and we've set out in the complaint precisely what that is. Paragraphs 25 to 28 set out in there precisely as the judge -- Your Honor had told us to do in compliance with the

statute.

And I want to note that the state's -- the City's response does not argue we haven't made a case of misfeasance. It doesn't argue we haven't made a case of malfeasance. It simply says we haven't established a pattern for gross neglect. And we believe that the complaint fully establishes a series of misconduct that for pleading purposes gives rise to the standard. This is a police officers who saw what was going on, who did his job, who reported when he had reason to believe the City apparatus was engaging in a coverup and reported it.

And then moving to the second part of the nexus. This not a nine-month issue, the cause of action was brought after the final adverse employee action, which was the demotion. But the amended complaint explains in basically a timeline narrative what occurred over the course of nine months from the initial improper action leading to the demotion.

He submitted his memorandum on June 2nd, 2017. Three weeks later he was excluded from a forum at which he should have been a participant, and he asserts that that was purposely directed because of his memorandum and it necessarily followed the issuance of his memorandum. Three weeks after the

memoranda he was not given his merit increase. The City then says oh, that was a clerical error. That's not what the complaint says. The complaint says that was a retaliation for his memorandum, an increase that he was obligated to get, that the City refutes. The City may defend factually and say well, we just made a mistake. That's a factual determination, not part of the complaint.

Next we allege in the complaint that the City initiated an IA investigation against him for retaliation purposes. We agree, the City can initiate IA investigations but they can't do it for retaliatory reasons. Maybe the City has some factual development that will show this was totally meritorious, but we say no, it was a purposeful action. And plainly an improperly motivated Internal Affairs investigation is and always is going to be causation for purposes of a whistleblower action, and the City offers no case that says otherwise.

Next, literally three weeks later our client is informed that he's being separately investigated for allegations of engaging in improper procedures directly relating to his whistleblower memo. Again, retaliation. And it leads ultimately to, and we have a factual reason as to why it

occurred some months later. He gets -- the IA completes its internal investigation, which we believe and have alleged is retaliatory, and he's demoted three ranks. All of those demonstrate over the course of nine months repetitive conduct in the nature leading to the adverse employment action that is plainly retaliatory.

For those reasons as to be supplemented for one minute by Mr. Pizzi, we ask the Court to deny the motion to dismiss. This case requires factual development to move forward on a validly stated whistleblower claim.

MR. PIZZI: Judge, may I have 30 seconds, Judge? If you look at the whistleblower memo filed by Mr. Cuevas, you know, that's what --

THE COURT: You call it a whistleblower memo, it's a memo.

MR. PIZZI: Correct.

THE COURT: It's a memo sent to the Chief based upon his disagreement with the disposition panel's findings that he had no business even commenting on, but go ahead.

MR. PIZZI: He actually goes beyond that. I think it's the City's position that he just disagreed with some routine disposition of an IA

panel. What he actually did was, in the memo, as we outline in our amended complaint, which is assumed to be true at this stage of the proceedings, he outlined multiple counts of what he reported to be perjury and false statements by sworn police officers. He outlined in his memo a conspiracy by higher-ups and sworn police officers to commit perjury and make false statements and rig and come up with the false conclusion to support their own agenda in the City.

So just to be clear, Your Honor, the memo that he wrote does not just say I disagree with the IA finding. The memo that he wrote specifically in detail, outlined in our complaint, which is assumed to be true, he outlined multiple acts of what he believed to be perjury by sworn police officers and he explicitly accused the City of malfeasance and of misconduct in condoning false statements and rigging -- engaging in a conspiracy to rig an official proceeding to frame a police officer. And what whistleblowers do -- if someone writing -- very few people write a memo that says whistleblower on top of it. But if a memo -- if a memo from a police officer that accuses -- that is sent to higher-ups, that accuses sworn police officers and a police chief of engaging in a conspiracy to commit malfeasance and

a miscarriage -- he specifically says they engaged in a miscarriage of justice, which included multiple acts of perjury and framing somebody in a proceeding. At this stage of the proceeding it is presumed to be -- the following is presumed to be true at the motion to dismiss stage. It's presumed to be true that Neal Cuevas told the City in a memo that the City engaged in a miscarriage of justice, including perjury and framing a sworn police officer as part of an illegal conspiracy.

That -- all we have to state in our complaint is that the City engaged in one act of misfeasance or one act of malfeasance. Neal Cuevas went beyond one act of malfeasance. He submitted an entire memo outlining at least a dozen acts of malfeasance and misconduct, including perjury, including framing a sworn officer. That clearly meets the standard of a whistleblower memo. That's what whistleblowers do.

And finally, Judge, once we establish that Neal Cuevas most certainly accused the City of multiple acts of misfeasance, malfeasance, improper conduct, under Florida law the benefit of the doubt goes to the plaintiff in terms of there's a very liberal standard because the Florida whistleblower

statute is designed to protect people and encourage people to report misconduct. The Court under Florida law is to liberally construe the correlation between the whistleblower between the reporting of the malfeasance and the ultimate adverse action.

In this case we've shown that after he reported the malfeasance and misconduct the following occurred. Number one, he got demoted several ranks, he was investigated --

THE COURT: We heard all this. You are just repeating everything Mr. Kuehne just said. And your 30 seconds were up four minutes ago.

MR. PIZZI: I appreciate it, Judge.

THE COURT: Okay.

MR. KANTOR: Judge, I'll be very brief. You know, Mr. Kuehne mentioned -- he argued that the City hadn't addressed the gross mismanagement or misfeasance or malfeasance. Page 3 through 4 of our motion we quote the full portion of the statute he's referring to. On Page 5 of the motion we discussed gross mismanagement, misfeasance and malfeasance.

The Statute 112.3187(3)(E) defines gross mismanagement. It also provides the definition for misfeasance and malfeasance. Their interpretation of these terms that the improper doing of an act which

is otherwise authorized, their interpretation that somebody can complain about that, would open the door for protection to every employee whoever disagrees with any employment decision ever. All the employee has to do is write a memo with some inflammatory language like conspiracy and rig and frame and say I disagree with your decision. You guys are just trying to frame this other guy. And now everyone is completely protected and they can never be demoted, they can never be disciplined at all.

I would submit that an attorney in your courtroom does not become a whistleblower simply because they disagree with your decision. I'm allowed to take a case up on appeal to the Third D.C.A., that does not make me a whistleblower.

THE COURT: The Court doesn't see this as whistleblower activity. It wasn't a whistleblower act, it was as far as the Court is concerned a comment on a disposition panel's report that he had no basis in his position to even comment on whatsoever. There was no adverse employment action that occurred as a result of this non-whistleblower memo. It doesn't matter how many times he throws whistleblower on there, he doesn't make it a whistleblower action just by doing that. You can

take a round peg and you'll never get it into a square hole no matter how hard of a hammer or big of a hammer you try and pound it in there. Motion to dismiss with prejudice is granted.

Thank you, folks.

MR. KANTOR: Thank you, Your Honor. Thank you very much.

(The proceedings were concluded at 10:15 a.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF DADE)

I, Pearlyck Martin, do hereby certify that the proceedings in the case of NEAL CUEVAS and CITY OF NORTH MIAMI, LARRY JURIGA and LARRY SPRING, pending in the Circuit Court of the ELEVENTH Judicial Circuit in and for BROWARD County, Florida, CASE NO. 2018--011899-CA-01 was heard before the Honorable Dennis J. Murphy, as Judge, November 15, 2018, that I was authorized to and did report in shorthand the proceedings and evidence in said proceedings; and that the foregoing pages, numbered from 1 to 20, inclusive, constitute a true and correct transcription of my shorthand report of said proceedings.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 17th day of December, 2018.

Pearlyck Martin.
NOTARY PUBLIC-STATE OF FLORIDA
COMMISSION# GG 174369
EXPIRES: JAN 30, 2022

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