

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: August 12, 2008

OPINION #08-002

TO: Brad Wirtz, Director of Human Resources

FROM: Michael P. May, City Attorney

RE: Relationship Between the City's Human Resources Department and the Police & Fire Commission in the Hiring of Fire Fighters

You requested my opinion on the relationship between the City's Human Resources (HR) Department and the Board of Police and Fire Commissioners (PFC) in the hiring of fire fighters. Specifically, you have asked whether changes that may be made by the HR Director in the City's standard application for employment forms are binding on the PFC.

The specific context in this case relates to questions asked of applicants about prior convictions. The issue, however, goes beyond the specific context in which the legal issue has arisen. In this instance, the Fire Department intends to ask questions about conviction records which go beyond the period for which convictions, if substantially related to the circumstances of the job, may be considered under Sec. 39.03 (8)(i)3.b., Madison General Ordinances (MGO). (§ 39.03(8)(i)3.b, MGO which establishes a 3-year limit on *use* of conviction record does not limit *inquiries* about conviction records).

There is no dispute that the additional questions which the Fire Department will ask in its application form are legally authorized under the city, state, and federal laws related to employment discrimination based upon conviction.

The real issue, thus, is not the legality of the questions to be asked on the application, but the manner and form of the employment application itself, and whether the manner and form of the application is entrusted to the HR Director or to the PFC.

SUMMARY OF CONCLUSIONS

Although the City's Human Resources Department and the Human Resources Director are given broad authority in Sec. 3.13, MGO, to assist City departments and to manage human resources policies, the specific and superintending authority given to police and fire commissions in Wis. Stats. §62.13(4), gives the Madison Police and Fire Commission final authority over the tests for employment of police officers and fire fighters, including the employment application form and the questions to be asked of the applicants.

RELEVANT STATUTES AND ORDINANCES

The Police & Fire Commission is governed by Sec. 62.13, Wis. Stats. Sub. (4) of that statute provides in part:

- (4) SUBORDINATES. (a) The chiefs shall appoint subordinates subject to approval by the board. Such appointments shall be made . . . from an eligible list provided by examination and approval by the board and kept on file with the clerk.
- (c) For the choosing of such list **the board shall adopt, and may repeal or modify, rules calculated to secure the best service in the departments. These rules shall provide for examination of physical and educational qualifications and experience,** and may provide such competitive examinations as the board shall determine, and for the classification of positions with special examination for each class. . . .
- (d) . . . **The examination, including minimum training and experience requirements, shall be job-related in compliance with appropriate validation standards and shall be subject to the approval of the board** and may include tests of manual skill and physical strength. All relevant experience, whether paid or unpaid, shall satisfy experience requirements. The board shall control examinations and may designate and change examiners who may or may not be otherwise in the official service of the city and whose compensation shall be fixed by the board and paid by the city. (Emphasis added).

The Madison PFC is established by Sec. 33.06, MGO.

The Madison Human Resources Department and the position of Human Resources Director is established by Sec. 3.13, MGO. Among the obligations imposed in this ordinance are:

- (3) (a) The Human Resources Director shall be responsible for the management and supervision of the Human Resources Department and its units and shall formulate, direct and coordinate the implementation and shall monitor the effectiveness of Human Resources policies, programs and services as they relate to all City employees.

- (5) (c) Relationship to City Departments. All departments of the City shall cooperate with the Human Resources Director or designee to the end that s/he may discharge the duties and responsibilities contemplated by this section. Department heads are directed to cooperate fully with the Human Resources Director and the designee in this purpose.

Pursuant to the authority given to the Police & Fire Commission by statute and ordinance, the PFC has enacted the following rule 4.c.i:

The Board shall authorize forms for making application for initial appointments.

DISCUSSION

The PFC is given broad authority with respect to the method of choosing subordinates in Sec. 62.13(4)(c) and (d), Wis. Stats. For example, the Board is given the authority to:

- ▶ Adopt, repeal, or modify rules calculated to secure the best service.
- ▶ Provide for examination of physical and educational qualifications and experience.
- ▶ Those examinations shall be “as the board shall determine . . .”.
- ▶ They may include minimum training and experience requirements.

The Wisconsin Supreme Court has commented on the purpose of the power and independence given to police and fire commissions under Wisconsin law. The law was enacted:

“... for the purpose of taking the administration of fire and police departments out of city politics, in order that the test of fitness for the position of fireman and policeman might be ability to serve the city, rather than ability to advance the political interests of the administration in power.”

State ex rel. Pieritz v. Hartwig, 201 Wis. 450, 453, 230 N.W, 2d 42 (1930).

Further, unlike other City boards, commissions or committees, the PFC has the authority to sue and be sued in its own name. *Racine Fire and Police Comm. v. Stanfield*, 70 Wis. 2d 395, 402, 234 N. W. 2d 307 (1975). The legislature also has

made it clear that the powers given to the PFC are of statewide concern and are not subject to modification by municipalities. Sec. 62.13(12), Wis. Stats.

In furtherance of this broad authority granted by the State, the City of Madison PFC has adopted a specific rule with respect to job applications. That rule requires that the PFC approve the form of the application for employment.

I think it is clear from the statutory authority granted the PFC, and the rules they have adopted, that the Commission has the authority to approve the form of applications for both police and fire fighters.

In contrast to the specific authority granted to a separate commission by state law, the authority granted to the Human Resources Department and to the HR Director is general in scope, and says nothing either implicitly or explicitly about ceding the authority of the PFC to the HR Director. To the extent MGO 3.13 and Sec. 62.13, Stats., were considered to be in conflict, rules of interpretation would favor the authority of the PFC. First, the general rule is that a city ordinance may not conflict with a state statute. *Anchor Savings & Loan Ass'n. v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 397, 355 N.W. 2d 234 (1984). In addition, the rule that the more specific statute or ordinance governs over the more general would mean that the specific powers given to the PFC would govern over the general powers of the HR Director. *Estate of Gonwa ex rel. Gonwa v. DHFS*, 2003 WI APP 152 ¶32, 265 Wis. 2d 913, 668 N.W. 2d 122

However, I do not even read the statutory authority, the rules, and the authority given to the HR Director as being in conflict. Courts read statutes and ordinances and attempt to harmonize them, if possible. *City of Milwaukee v. Kilgore*, 193 Wis. 2d 168, 184, 532 N.W. 2d 690 (1995). I read the cooperative language in MGO 3.13(5)(c), and the general authority given to the Human Resources Director in Sec. 3.13(3)(a), MGO, as indicating that the HR Director is available to assist the Police or Fire Departments, and the Police & Fire Commission, if called upon to do so. Although the PFC retains the ultimate authority to approve examinations and other matters related to the hiring of police officers and fire fighters, the PFC could certainly delegate this to an agent, be it the Police Chief, the Fire Chief, or the HR Director. Indeed, the suggestion of cooperation in the ordinances strongly implies that the assistance flowing from the HR Department to the Police & Fire Departments, and the request for such assistance to the HR Department, are pursuant to the cooperation contemplated by the ordinance.

It is only in a unique situation, such as presented here, where there is some conflict between the desires of the HR Department and the Fire Department, that there is a need to determine which of the two bodies has ultimate authority in the hiring of police

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officers and fire fighters. It is my conclusion that in such circumstances, the Police & Fire Commission has the authority to make such determinations.

Michael P. May
City Attorney

cc: Mayor Cieslewicz
All Alders
City Clerk
Chief Debra Amesqua
Chief Noble Wray
Scott Herrick

SYNOPSIS: While the Human Resources Department and the Police and Fire Departments are encouraged to cooperate in matters related to the hiring of police officers and fire fighters, the Police & Fire Commission retains the ultimate authority to set standards and control the application process.