City of Madison

MINUTES – APPROVED

CCOC Subcommittee on Police & Community Relations

City of Madison
Madison, WI 53703
www.cityofmadison.com

Wednesday, November 9, 2016 **7:00 p.m.** **Room 260, Madison Municipal Building 215 Martin Luther King, Jr. Blvd.**

Meeting Video | Website | Handouts at Meetings | Meeting Minutes

Members Present: Ald. Shiva Bidar-Sielaff, Ald. Marsha Rummel, Ald. Denise DeMarb, Ald. Rebecca Kemble and Ald. Sheri Carter (arrived at 7:03 pm)

Staff Present: Heather Allen, Council Legislative Analyst, Capt James Wheeler, MPD Representative, Lisa Veldran, Council Administrative Assistant

Others Present: City Attorney Michael May, Assistant City Attorney, Marci Paulson

Call to Order
Chair, Ald. Marsha Rummel, called the meeting to order at 7:00 p.m.

Approval of October 17, 2016 minutes
Ald. Shiva Bidar-Sielaff moved approval of the minutes from the October 17, 2016 CCOC Subcommittee on Police & Community Relations meetings, seconded by Ald. Denise DeMarb. Motion was approved unanimously.

Public Comment
There was no public comment.

Disclosures & Recusals
There were no disclosures or recusals from members of the subcommittee present.

Review and Adoption of language to allow for public discourse during certain items on the agenda
Suggested language from City Attorney:

> Suspension of Roberts Rules of Order may occur on Agenda Item No. X to allow the subcommittee to act informally, thereby allowing for the public to participate in subcommittee discussions and provide testimony. The chair shall maintain order and decorum, any motions must remain in accord with Robert's Rules; the suspension of the rules applies only to this item.

Ald. Shiva Bidar-Sielaff moved approval of the language to be included on future CCOC Subcommittee on Police & Community Relations agendas, seconded by Ald. Denise DeMarb. Motion was approved unanimously.

Presentation & Discussion: Division of legal authority between the Police Chief, the Mayor and the Council in the operation of the police department – City Attorney Michael May & Assistant City Attorney Marci Paulsen

City Attorney May distributed the following documents to members of the subcommittee to facilitate discussion:

> 9/24/01 | Opinion No. 2001-007
> Collective Bargaining, Police and Fire Discipline and State Stats. 62.13

4/19/05 | Report of City Attorney
Resolution requesting that the MPD cease the use and rescind the authorization to purchase Tasers until such time at their safety can be confirmed or alternative devices of proven safety and effectiveness can be utilized.

5/18/09 | Opinion No. 09-001
Alders and Personnel Matters before the Police and Fire Commission

1/4/13 | Memo
Legal Considerations Regarding Independent Investigation of Police Officer Involved Shooting Incident

There is no clear answer on what authority the Common Council has as it relates to the Madison Police Department. It is dependent upon the nature of the issue.

Key State Statutes

62.09(8) – Mayor head of police and fire departments: The mayor shall be the chief executive officer. The mayor shall take care that city ordinances and state laws are observed and enforced and that all city officers and employees discharge their duties.

62.09(13) – Police chief is to run the police force, obey "lawful orders" of the Mayor (e.g. email) and Council (e.g. resolution): 62.13 (2e) (a) 1. shall have command of the combined protective services force, under the direction of the mayor. The chief shall obey all lawful written orders of the mayor or common council.

62.11 (5) – Home rule amendment: Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

62.13 – Police and Fire Commission (PFC) statute has authority to hire and fire police and fire chiefs, ultimate discipline authority (can be heard); purpose of this statue is to remove the departments from the political influences of the common council.

- The Council can affect police policies through their budget authority (e.g. funding for equipment, taser resolution) not day-to-day operations.
- The Council can influence the police chief's policies (e.g. use of force) but cannot set the policies.
- The Mayor can bring a complaint against the police chief at the Police and Fire Commission, but the Council cannot.

There was discussion on lawful orders. If police chief does not follow lawful order by the mayor, mayor has power to bring complaint to PFC, if police chief does not follow lawful order by the council, council would need to go to circuit court with complaint. No case law in defining "lawful" in this area. City Attorney would need to look in other Wisconsin laws and other law enforcement-type laws (e.g. New York). Council could direct Chief to review standards or policies but could not direct changes to specific day-to-day operations.

Ald. Rebecca Kemble stated that the council would not set standards for individual officers but give direction to the Chief on specific changes to policies, for example, de-escalation as part of police training. City Attorney May stated that the council could say that they would like the Chief include this topic in training vs. your use of force policy *must* contain this standard.

Ald. Marsha Rummel asked if the Chief needs to communicate to the Council on changes to the use of force policy. City Attorney May stated that the Chief is under no legal obligation to do that. Council could ask the Chief to communicate those changes.

Ald. Shiva Bidar-Sielaff asked if the city would need additional indemnification if the city has policies that are more restrictive than the State Statutes. City Attorney May stated there could be additional liability if special policies are enacted by the Council (that would need to be decided by the Council).

Ald. Marsha Rummel referenced an email earlier in the year from City Attorney May about adding additional duties for the Police and Fire Commission. Under State Statute the commission would set the policies and budget authority for police and fire departments vs. the Police and Fire Chiefs:

(6) Optional powers of board.

(a) The board of fire and police commissioners shall have the further power:

1. To organize and supervise the fire and police, or combined protective services, departments and to prescribe rules and regulations for their control and management.

2. To contract for and purchase all necessary apparatus and supplies for the use of the departments under their supervision, exclusive of the erection and control of the police station, fire station, and combined protective services station buildings.

3. To audit all bills, claims and expenses of the fire, police, and combined protective services departments before the same are paid by the city treasurer.

Ald. Denise DeMarb requested that if subcommittee members sent questions about this discussion to the City Attorney or Assistant City Attorney Paulsen that the responses be sent to all subcommittee members.

Heather Allen noted an analysis done by PERC that looked at Milwaukee's PFC and referenced historically how a new mayor would fire the chief and fire all the police force. She wondered if this wasn't what was an *unlawful* type of order and wondered if by lawful it was a legal order.

Member Report: Attendance at State Rep. Chris Taylor's Discussion on Use-of-Force Policies on October 13, 2016
Alders attending the discussion: Ald. Rebecca Kemble, Ald. Denise DeMarb, Ald. Shiva Bidar-Sielaff, Ald. Ledell Zellers

Ald. DeMarb attended and noted that Rep. Taylor has done so much research on the topic and would like her to attend a future meeting of this subcommittee and the MPD Policy & Procedure Review Ad Hoc Committee.

Ald. Kemble noted that she also discussed other cities adopted policies.

Ald. Rummel and Ald. McKinney spoke with Rep. Taylor earlier and were given a handout. Check to see if it has been updated.

Discussion: Meeting agenda for next meeting | future meetings

Monday, November 21, 2016
6:30 pm, Meadowridge Library
Scheduled Presentation: United Way/MPD Task Force Report
Captain James Wheeler & Captain Kristen Roman, MPD

Thursday, December 1, 2016
Noon, Room 417, City-County Building
Scheduled: Subcommittee process & check-in meeting

Tuesday, December 13, 2016
6:00 pm
Goodman Community Center (Evjue Room)
Scheduled Presentation: Rep. Chris Taylor (tentative)

Adjournment
Ald. Shiva Bidar-Sielaff moved, seconded by Ald. Rebecca Kemble, to adjourn. Motion passed unanimously. Meeting adjourned at 8:20 p.m.

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

Date: May 18, 2009

OPINION NO. 09-001

TO: Alder Michael Schumacher

FROM: Michael P. May, City Attorney

RE: **Alders and Personnel Matters before the Police and Fire Commission**

You have requested my opinion on the manner in which Alders could provide information or otherwise make their views known on matters related to the promotion of Police Officers, as recommended by the Chief of Police, and approved by the Police and Fire Commission (PFC). I will consider the question only as to Police Officers, although similar issues might arise with Firefighters.

Short Answer

As will be set out in detail below, I recommend that Alders utilize the existing system established by the Madison Police Department (MPD). Under this system, compliments, complaints or concerns about an officer's conduct are to be made in writing to the Chief of Police. Such communications become part of the employee's personnel file. The Police Chief and the PFC then review these matters at the time that the officer is considered for promotion.

There is also a more formal complaint process that any citizen may utilize; such complaints are handled by the Professional Standards & Internal Affairs Unit (PS&IA) of the MPD. It should be noted that the informal communications mentioned above may also trigger a PS&IA investigation, if the information provided implicates a possible rule violation. My understanding is that this investigatory/disciplinary process was not part of your inquiry.

Discussion

The question you raise is a mixed question of legal and policy determinations. Because of this, I will first discuss the law applicable to the situation you discuss, will then describe the current procedure for operation of the Police Department and the PFC with respect to personnel matters, and will finally explain why I make the recommendation outlined above.

Legal Attributes of the Police and Fire Commission

Under Wisconsin law, Madison is required to have a PFC. This is pursuant to Sec. 62.13 of the Wisconsin Statutes. By statute, the powers and operations of a PFC are a matter of statewide concern and may not be modified in any significant respect by municipalities. Sec. 62.13(12), Wis. Stats. In accordance with Sec. 62.13(4), Wis. Stats., chiefs appoint subordinates, both initial hires and promotions, subject to approval by the PFC.

One of the major purposes of a PFC is to remove the appointment and promotion of police officers and firefighters from the vicissitudes of political processes and municipal elections. *Conway v. Board of Police and Fire Commissioners of City of Madison,* 262 Wis. 2d 1, 20, 662 N.W. 2d 335 (2003), citing *State ex re. Pieritz v. Hartwig,* 201 Wis. 450, 230 N.W. 42 (1930). It is to be "an impartial body that operates independently of the city itself …" and "is designed to prevent the board from operating as an agent of a city official or police or fire chief." *Heil v. Green Bay Police and Fire Commission,* 2002 WI APP 228, ¶ 14, 256 Wis. 2d 1008, 1016, 652 N.W. 2d 118 (2002), citing other cases. In furtherance of that, the PFC is given significant independence. It constitutes its own legal entity for purposes of suing and being sued. *Racine Fire and Police Commission v. Stanfield,* 70 Wis.2d 395, 402, 234 NW 2d 307 (1975). As such an independent entity, it also has its own legal counsel. When complaints are brought by the Chief of Police before the PFC seeking discipline or removal of an officer, the City Attorney represents the Chief of Police, while the PFC has its own attorney.

Moreover, the Madison PFC is not a body which is entrusted with operating the Police or Fire Department. While some PFC's are given the "optional powers" set out in Sec. 62.13(6), Wis. Stats., Madison's PFC does not have those powers. Thus it is the Chiefs of Police and Fire who have the obligation for operational control of the departments. While these positions are subject to some oversight by the Mayor and Common Council under Sec. 62.09 (8) and (13), Wis. Stats., the chiefs enjoy a great deal of independence. This issue is explored in some length in a report prepared by our office with respect to a resolution on tasers offered some years ago. See Report of the City Attorney on Resolution ID # 00572, April 19, 2005.

In short, the Madison PFC operates as an independent personnel body with respect to matters before the Police Department.

PFC and MPD Procedures

In furtherance of the above legal guidelines and pursuant to the authority granted under Sec. 62.13 (4) and (5), Wis. Stats., the PFC has adopted rules to guide it in the exercise of its statutory responsibilities. These rules address the entry level hiring process as well as appointment to promoted ranks. In addition, MPD has developed a very specific procedure to assist the PFC in undertaking its personnel obligations. As mentioned above, the PFC must approve the recommendations of the Chief of Police

with respect to officer promotion or hiring. The PFC has additional obligations with respect to hiring.

As part of its management responsibilities, the MPD maintains a personnel file on each and every officer in the department. Comments that are received from any member of the public are collected within these files. The comments may be positive, negative, or merely neutral. If they are deemed relevant to future decisions with respect to the officer's advancement, they are maintained in the file. The MPD has developed a specific form – the "Officer Conduct Reporting Form" -- which may be used to provide these comments to the Department, the Chief of Police, and eventually the PFC. This form, together with a letter from the Chief of Police and a summary of the complaint resolution process, are available on the MPD website at:

http://www.cityofmadison.com/police/about/professionalStandards.cfm

A copy of those documents are attached.

Use of the personnel file in the decision-making process with respect to an officer's advancement has been formally incorporated into the promotional procedures of both the Police Chief and the PFC. Pursuant to an MOU between the Chief (City) and the MPPOA, the Chief's process for selection provides that each candidate's captain will review the personnel and complaint files as well as the resume for the candidate. In addition, the commanding officer of the candidate makes a presentation to the MPD Management Team to give a comprehensive picture of the candidate. This includes information in the candidate's personnel and complaint files. It is my understanding that this review has historically been part of the Chief's promotional process.

The PFC's rules with respect to appointments by promotion are set forth in PFC Rule 4.f. On the matter of personnel file review, the PFC's process is detailed and explicit:

> At each regular meeting of the Board, the Chief shall inform the Board regarding any promotional appointments which the Chief then intends to present to the Board at either of the next two Board meetings. During the interim between receiving that information and acting on the Chief's recommendation, any Commissioner by arrangement with the Chief may examine the complete personnel record of the prospective appointee. The Board shall act on recommendations of the Chief for promotional appointment at any regular or duly scheduled special meeting following such opportunity for examination of the appointee's record. PFC Rules and Regulations 4.f.v.

In practice, either some or all of the PFC actually review the entire personnel file for each officer being considered for promotion. The existing systems established by the MPD and the PFC ensures that compliments, complaints and concerns about an

officer's conduct can be folded into an orderly review process and given due consideration by both the Police Chief and the PFC at the appropriate stage.

I noted in my Short Answer to this opinion that my understanding is that the MPD and PFC disciplinary process was not part of your inquiry. Consequently, this opinion does not address that matter in any depth; I include only the following brief summary. There is also a specific and much more detailed procedure with respect to complaint proceedings seeking suspension, demotion or removal of a police officer. The procedure ensures the Chief of Police, as to MPD's investigatory process and disciplinary decision, and the PFC, as part of its quasi-judicial proceedings and final determination, comply with statutory requirements and satisfy the "seven just cause standards" in Sec. 62.13(5), Wis. Stats., as to any discipline imposed. Sec. 62.13(5), Wis. Stats., "provides procedural steps to be followed in proceedings against a member of a municipal police department"; "embodies the 'substantial elements' of a common-law hearing ... by providing for the filing of a written formal charge …, a public hearing at which the officer may be represented by counsel and may subpoena witnesses; and an appeal to the circuit court." The statutory procedure has been held by the Wisconsin Supreme Court "to meet the requirements of due process." *State ex. rel. Richey v. Neenah Police and Fire Commission,* 48 Wis.2d. 575, 580-81, 180 N.W.2d 743 (1970).

Finally, it should be noted that because of the legal nature and attributes of the PFC outlined above, it does not have the same procedures that many City committees have. There is no required public comment period before the PFC; Alders do not enjoy the right of participation at the PFC; it has adopted a series of rules and policies independent of those established by the Common Council for other City committees, which are considered arms of the Council or the Executive, or both. In one of the cases cited above, *Heil v. Green Bay Police and Fire Commission,* a liaison from the common council participated in discharge proceedings before the Green Bay PFC, but did not have the right to vote. The court held that the proceedings were void because the officer's due process rights had been violated by the participation of this outside person.

Recommendation:

Based upon the above-discussed legal limitations, I am very concerned about Alders appearing at meetings of the Police and Fire Commission and making statements about individual police officers, at least outside of a formal complaint proceeding. As with other citizens, Alders can certainly bring formal complaints if they believe it is warranted. However, appearance at these meetings begins to raise troubling questions of whether the Alders are -- in spirit if not in law – crossing the line of independence from political action that the PFC has been established to prevent. This concern is highlighted by the outcome in the *Heil* case mentioned above.

Alders may, as may any other citizen, submit comments to the Chief of Police with respect to the performance of any officer. Those comments are gathered and will be available to the PFC when it deliberates upon future personnel actions with respect to that officer.

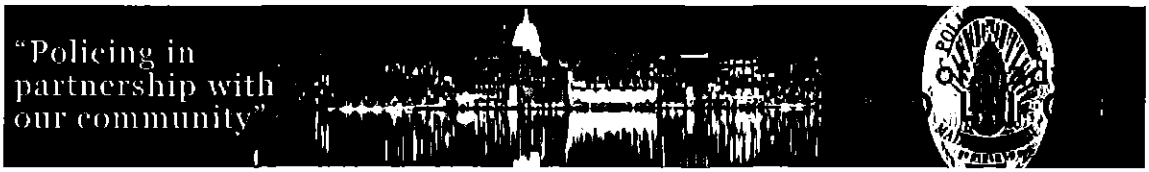
I recommend that the Council members take advantage of this existing MPD procedure. I further recommend that the comments actually be submitted in a written, paper document. While the MPD attempts to gather comments filed by email, it may be difficult in an individual case to determine a person's intentions; i.e., whether a person is commenting on an MPD policy, raising a concern or passing on a compliment about the performance of a particular officer, or simply complaining about something that may or may not actually reflect on the officer's conduct. Thus, a paper copy delivered to the Chief of Police will not be mistaken as having some other intention.

Michael P. May
City Attorney

Attachments

SYNOPSIS: Due to the independent nature of the Police and Fire Commission, Alders who desire to comment on the performance of police officers or firefighters should use the established process of filing written comments with the Departments.

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



City-County Building
211 South Carroll Street
Madison, WI 53703-3303
Phone: 608 266-4022
TDD: 608 266-6562
www.madisonpolice.com

Dear Citizen:

Thank you for contacting the Madison Police department to express your concerns. The Madison Police department is committed to investigating complaints in an open and fair manner with determining the truth as our primary objective. To assist us with this effort, please provide as much information as possible, including specific dates, times and the names of officers involved. State the reasons you believe the officer's conduct was inappropriate and provide us with the names of witnesses and how they can be contacted. It is especially important that you provide us with your contact information as well. You may use additional paper as needed.

Before completing and signing your statement, please read the section regarding confidentiality and select the statement of your choice. Your complaint and related documents are a public record and subject to disclosure upon a request for documents from the news media or any other person. The Department routinely discloses summaries of complaint investigations and their dispositions to the news media. If you request confidentiality, the Department will make every legal effort to respect your request. However, it is not possible to guarantee confidentiality.

It is also important to note that depending upon the nature of your complaint, it may not be necessary for you to submit your complaint in writing. Many citizen complaints can be more efficiently and appropriately addressed by speaking directly with the employee's Commanding Officer or Supervisor.

If you choose to submit your complaint in writing, you may mail it or drop it off in person at:

Madison Police Department Professional Standards
211 South Carroll Street (GR28)
Madison, WI 53703-3303

You may contact the Professional Standards and Internal Affairs Unit to discuss the nature of your complaint. The Internal Affairs sergeant can also answer any questions you may have about the process. The Professional Standards and Internal Affairs Unit is open Monday through Friday during regular business hours. The direct telephone line is (608) 266-6502.

You may decide to take your complaint directly to the Madison Police and Fire Commission (PFC). Forms for that purpose are available in the city Clerk's Office and the Mayor's Office. In some cases, the Department or officers involved may take your complaint to the PFC. Any proceedings before the PFC are public. Documents related to PFC proceedings are public records and are generally subject to disclosure under Wisconsin Law.

Lastly, the Department is required by State Law to inform you that, "**whoever knowingly makes a false complaint regarding the conduct of law enforcement officer is subject to a Class A forfeiture.**"

Sincerely,

Noble Wray

Noble Wray, Chief of Police

Enclosure: Complaint Statement Form

MADISON POLICE DEPARTMENT

Officer Conduct Reporting Form

Complainant and Contact Information

NAME			
ADDRESS			
CITY		STATE	ZIP CODE
HOME PHONE	WORK PHONE		CELL PHONE
STATEMENT GIVER IS ☐ Aggrieved Party ☐ Witness to Incident ☐ Other			

Involved MPD Personnel and Allegation

OFFICER(S) NAME AND/OR NUMBER
MPD CASE NUMBER (IF AVAILABLE)
DATE AND APPROXIMATE TIME OF INCIDENT
LOCATION
ALLEGATION(S)

Please attach a description narrative of the incident.

Please Read Carefully Before Signing

Choose one statement regarding confidentiality:

☐ I request my name be kept confidential.
☐ I request my name, address and phone number be kept confidential.
☐ I will not provide any information regarding this matter unless I am pledged confidentiality as indicated above.
☐ I do not request confidentiality in regard to this matter.

By signing the line below, I am affirming that I have read the letter from the Chief of Police pertaining to the complaint process and confidentiality; the details contained in my statement are true and correct to the best of my knowledge.

_____ _____
Signature Date

PS & IA USE ONLY			
DATE	EMPLOYEE	CR #	INTAKE NAME

HOW TO FILE A COMPLAINT

The Madison Police Department is committed to investigating complaints in an open and fair manner with truth as its primary objective. Therefore, this Department will accept complaints against its employees, policies or procedures, and investigate all such complaints to the appropriate disposition.

> Complaints will not be investigated if the complaint is received more than ninety (90) days after the alleged incident, except if the complaint involves an alleged criminal violation, or the complainant can show good cause for not making the complaint within the specified time limit.

COMPLAINT OPTIONS

Generally, citizens are encouraged to pursue their complaint through the internal process. However, you should know about both options available to you:

1. You may file a complaint with the Professional Standards Office within the office of the Chief of Police, or
2. You may file a complaint against a commissioned employee with the Board of Police and Fire Commissioners, as provided by State law. This is done by filing your complaint through the Mayor's Office, Room 403, or the City Clerk's Office, Room 103, both in the City-County Building.

COMPLAINT PROCESS

1. Call, write, e-mail, or stop by the Chief's Office in GR-28 of the City-County Building, 211 S. Carroll Street, Madison, WI 53703 (608) 266-6502.

   Complaints placed after 4:00 p.m. or on weekends should be directed to the Officer-in-Charge at (608) 266-4418.

2. Your complaint will be filed with the Professional Standards Unit, within the Executive Office. You will receive confirmation that your complaint has been received, and an indication as to whether your complaint will or will not be investigated.

3. Upon completion of an investigation, the Lieutenant assigned to investigate your complaint will make one of the following determinations:

Unfounded

The investigation conclusively showed the incident complained of did not occur, or that the individual named in the complaint was not involved.

Exonerated

The incident complained about did occur, but was justified, lawful and proper.

Non-Sustained

The investigation failed to reveal enough evidence to clearly prove or disprove the allegation.

Sustained

The investigation disclosed enough evidence to clearly prove the allegation.

The Chief of Police reviews all findings. When a finding of "sustained" is reported, the Chief will decide whether to take immediate corrective action or to forward the report to the commanding officer of the individual named in the complaint. Appropriate corrective action, which may include counseling, training, oral reprimand, written reprimand, suspension, demotion, or dismissal, may be taken. The Chief of Police will make the final determination.

> A notary public is available at the Madison Police Department at no charge.

INFORMATION NEEDED

The supervisor assigned to investigate your complaint will ask for the following information:

- Your name, address and phone number;
- The date and time of the incident about which you are complaining;
- The names, addresses, and phone numbers of any witnesses, if available;
- If the incident involves an arrest, the name, address, and phone number of the person arrested, if known;
- The name, badge number, and car number of the officer(s) involved, if known;
- Details of the incident that prompted your complaint.

The Madison Police Department is in compliance with the equal opportunity policy and standards and all applicable state and federal statutes and regulations relating to nondiscrimination in employment and service delivery.

MADISON POLICE DEPARTMENT
211 S CARROLL ST
MADISON WI 53703
Phone: (608) 266-4022
Fax: (608) 266-4855

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MADISON POLICE DEPARTMENT

COMPLAINT RESOLUTION PROCESS

The best way to insure that we have an honest and excellent police department is to first police ourselves.

Noble Wray, Chief of Police

AGENDA #_____

CITY OF MADISON, WISCONSIN

REPORT OF:	City Attorney	PRESENTED	April 19, 2005
		REFERRED	
TITLE:	Resolution requesting that the Madison Police Department cease the use and rescind the authorization to purchase Tasers until such time as their safety can be confirmed or alternative devices of proven safety and effectiveness can be utilized.	REREFERRED	
		REPORTED BACK	
		ADOPTED	POF
		RULES SUSPENDED	
		ID NUMBER	00572
AUTHOR:	Carolyn S. Hogg, Assistant City Attorney		
DATED:	April 7, 2005		

TO THE MAYOR AND COMMON COUNCIL:

The above-entitled resolution has been referred to the Office of City Attorney for a legal opinion on the authority of the Mayor and the Common Council by Resolution "to request that the Madison Police Department cease the use and rescind the authorization to purchase Tasers until such time as their safety can be confirmed or alternative devices of proven safety and effectiveness can be utilized." With respect to the budgetary issue, the Fiscal Note to the Resolution advises as follows: "The Police Department currently has no budget authorization funding to purchase additional Tasers. Supplies would be purchased from grant funds or operational budget funds "

Given the current language of the proposed language, the direct answer can be very brief:

1. There is nothing in the law that prohibits the Mayor and Common Council by means of an adopted resolution from *requesting* that the Police Department cease engaging in a particular practice The Police Chief is then free to consider such request and exercise his discretion to accept or reject it based upon his assessment of its wisdom, usefulness, practicality, hazard and such other relevant criteria

2. Since there is no *specific* budget authorization to fund the purchase of Tasers, direction to *rescind* such authorization has no meaning under the circumstances.

Since those drafting details could be modified by an amendment, this opinion addresses the broader issues implicated by the resolution: Whether the Mayor and/or Common Council can order the Police Chief not to use Tasers; and whether the Mayor and the Common Council can via the budget preclude the use of Tasers by specifying that no Police Department funds, including those received as grants, can be expended for the purchase of Tasers until "their safety can be confirmed." These are not simple questions Because the issue of the relationship between the Chief, the Mayor and the Council are of continuing interest, this Report will discuss them at some length

INTRODUCTION

These questions require an examination of the structure of police department regulation and accountability in Wisconsin This necessarily involves an analysis of the balance of authority and responsibility over police departments, which is distributed among several entities: the Police Chief, the

Board of Police and Fire Commissioners of the City of Madison (PFC), the Mayor, and the Common Council.

The Police Chief is appointed by the PFC and holds office during good behavior, subject to suspension or removal by the PFC for cause. The Police Chief has the day-to-day operational control of the Police Department and, by implication, possesses those powers necessary to fulfill her/his duties. By statute, the Mayor is the head of the police department and can expect the Police Chief to obey her/his "lawful orders." The mayor is also obligated, as chief executive officer of the City, to execute all of the laws and ordinances of the City. The Common Council has general statutory authority to regulate the City's public services and the health, safety and welfare of the public and specific statutory authority like the Mayor, to issue "lawful orders" to the Police Chief.

There is very little legal authority to help illuminate the question of where the respective roles of the Mayor, the Common Council, the PFC and the Police Chief begin and end.[1] I have examined case law, together with relevant Wisconsin Statutes and Madison General Ordinances (MGO).

STATUTES/ORDINANCES

There are statutes and Madison General Ordinances which specifically relate to the Mayor's role as chief executive; the Common Council's responsibility for the general welfare of its citizens; the role of the PFC in the appointment and oversight of the Chiefs; and the Police Chief's responsibility for the general supervision of the Police Department

Mayor

Section 62.09(8), Wis. Stats., provides as follows:

> (a) The mayor shall be the chief executive officer. The mayor shall take care that city ordinances and state laws are observed and enforced and that all *city officers and employees discharge their duties.*
>
> * * * *
>
> (d) Except in cities that have adopted s. 62.13(6), the *mayor shall be the head of the fire and police departments*, and where there is no board of police and fire commissioners shall appoint all police officers, and the mayor may, in any city, appoint security personnel to serve without pay, and in case of riot or other emergency, appoint as many special police officers as may be necessary.

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[1] An interesting illustration of the various roles - quasi-judicial, administrative, executive, legislative - appears in the case of Christie v. Lueth, 265 Wis. 326, 333, 61 N.W.2d 338 (1953). In that case, charges had been filed against a police officer and hearings held on those charges. The hearings ended when the board, unable to maintain order, declared a mistrial, dismissed the charges, and then resigned *en masse*. The common council then adopted a resolution directing the chief of police to file charges again against the police officer, and the mayor to appoint a new police and fire commission. The police officer sued the mayor, city attorney, chief of police, and members of the common council to enjoin them from enforcing the resolution The court's holding reflects the balance of power in such matters. With respect to the contention that by adopting the resolution the common council invaded the executive and judicial prerogatives in violation of separation of powers, the court held that the common council did not attempt to perform any of the function of the other divisions of government. The resolution simply pointed out the duties of executive officials and "directed them to get busy." Id. at 331.

Section 3.03(1) MGO states:

> The Mayor shall devote his entire time to the duties of the office of Mayor. The Mayor *shall have the general supervision of all City officers and heads of department in the performance of their official duties.*

Chief of Police

Sec. 62.09(13)(a), Wis. Stats. provides in relevant part:

The chief of police shall have command of the police force of the city under the direction of the mayor. The chief shall obey all lawful written orders of the mayor or common council. The chief and each police officer shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables.

Section 5.01 MGO states:

(1) Police Department. *The Police Department shall be under the supervision of the Police Chief* who shall be the commanding officer of the police force and responsible for the enforcement of law and order. He shall be responsible for the care and maintenance of all property and equipment of his division.

Section 5.03 MGO states:

(1) *The Chief of Police shall have general supervision over the Police Department and be responsible for the efficiency thereof.*

* * * *

(3) It shall be the duty of the Chief of Police and of all police officers to preserve the public peace, and to suppress all riots, disturbances, and breaches of the peace, and they shall, with or without process, apprehend all disorderly persons or disturbers of the peace and take them before the Circuit Court of Dane County.

Common Council

Section 62.11(5), Stats., sets forth the powers of the Common Council as follows:

> Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, *finances*, highways, navigable waters, and *the public service*, and shall have the power to act for the government and good order of the city, for its commercial benefit, *and for the health, safety, and welfare of the public* . . . (Emphasis added).

PFC

Section 62.13 Wis. Stats[2]. sets forth the Chief appointment process and the PFC's authority in that regard.

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[2] Sec. 62.13(12), Stats. specifically states that the regulation of the police and fire departments are matters of statewide concern. Municipalities may act, even in matters of statewide concern, if there is no express language elsewhere in the statutes restricting this power and as long as the ordinance or resolution does not infringe upon the spirit or purpose of a state law or general policy. State ex rel.

(1) COMMISSIONERS Except as provided in sub. (2m), each city shall have a board of police and fire commissioners consisting of 5 citizens , 3 of whom shall constitute a quorum . . . .

* * * *

(3). Chiefs. The *board shall appoint the chief of police* and the chief of the fire department. who shall hold their offices during good behavior , *subject to suspension or removal by the board for cause.*

* * * *

DISCUSSION

I. Authority/Responsibility

Mayor

The Mayor is the head of the Police Department and the City's chief executive. The duties of the mayor as "chief executive officer" are primarily to see that state laws and city ordinances are enforced. 62.09(8)(a); State ex rel. Davern v. Rose, 140 Wis. 360, 366-67 (1909) (stating that the grant of executive power is the general power to execute the laws); cf. 56 Am Jur 2d, *Municipal Corporations* § 245 ("Generally, the mayor as chief executive officer, is empowered to implement and enforce legislative pronouncements emanating from the city council.") In fact in Davern, supra, p. 366, the Wisconsin Supreme Court analogized a Mayor's characteristics as Chief Executive to those of the President of the United States. While the mayor cannot be expected to execute or enforce a law or ordinance that is *invalid,* Roelvink v. Zeidler, 268 Wis. 34, 43 (1954), once a valid ordinance has been adopted into law, the mayor as chief executive officer has the duty to enforce that ordinance. The Mayor shall also ensure that City officers and department heads discharge their official duties. Sec 62.09(8), Stats., 3.03(l), MGO. In an Opinion of the League of Wisconsin Municipalities, a Mayor's authority was generally described as follows:

> As the designated chief executive officer of the municipality, the mayor would have the responsibility and authority of overseeing the operation of all departments of the municipality to insure the proper management and direction of the city administration in accordance with law and policies established by the common council. In my opinion, it would be entirely too restrictive a view of the mayor's role to limit his executive authority to express directives of the state statutes and local ordinances. (Opinion dated October 7, 1976).

Note that the Mayor's authority as head of the Police Department is not unlimited. There are several key areas in which the Mayor, even as head of the Police Department, expressly does *not* have authority to supercede the Police Chief. Sec. 62.13, Wis. Stats., for example, allocates discrete tasks to the PFC and department chiefs–in the area of appointing and disciplining department personnel. The Mayor and/or the Common Council lack the authority to order the Police Chief to act in a particular way on any specific issue falling under the purview of the Chief or the PFC pursuant to Sec. 62.13, Stats.[3]

Wilson v. Schocker, 142 Wis. 2d 179, 184 (Ct. App. 1987); Local Union No. 487 v. City of Eau Claire, 141 Wis. 2d 437, 444 (Ct App 1987).

[3] The Attorney General in an Opinion repeated an old expression of the purpose of the police and fire commission law , noting as follows:

> ". . . police and fire commission 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 the ability to advance political interests of the administration in power." State ex. rel.

Another area of express limitation involves police department records. As City Attorney Edwin Conrad explained in a May 8, 1973 memo to Mayor Soglin, the Mayor lacks the authority–even as head of the police department-to order a police department chief to allow inspection of department records. Per the City Attorney's opinion, the chief was the legal custodian of all investigation files in his or her office, and Sec. 62.09(8)(d) did not give the mayor the right to overrule the lawful order of the custodian with respect to confidential investigation files.

Common Council

Sec. 62.11(5), Stats. is a broad grant of authority to legislate for the general welfare. Legislation for the general welfare logically may affect the operations and budget of municipal agencies, including the Police Department. For example, the Wisconsin Supreme Court has held that § 62.11(5), Stats., empowers a common council to enact ordinances for the management and control of fire department employees, sustaining an ordinance prohibiting outside employment of firefighters. Huhnke v. Wischer, 271 Wis. 66, 70 (1955). State ex rel. Wilson v. Schocker, 142 Wis. 2d 179, 184-85 (Ct. App. 1987) upheld a budgetary resolution limiting the power of the police and fire commission to promote police officers by making the filling of vacant positions subject to approval of the Mayor and Common Council based on a finding of essential need.

Police Chief

The Police Chief is responsible for the operation and control of the Police Department[4] subject, as previously mentioned, to the lawful written orders of the Mayor and the Common Council under § 62.09(13), Stats. The Police Chief is also given specific responsibilities and authority under Wisconsin Statutes relating to law enforcement. The following is an illustrative but by no means exclusive list: § 968.07, Arrest Powers; § 175.40, Close Pursuit; §968.075, Domestic abuse, required arrests; § 968.085 Power to Issue Citations; § 968.11, Search Authority; and § 973.075 Seizure of Property Derived from Crime. Further, the Police Chief has the responsibility to see that the officers in his department are in compliance with all Wisconsin Law Enforcement Standards Board training and standards requirements. Sec. 165.85, Wis. Stats., et seq. and Chapter LES 3 of the Wisconsin Administrative Code.

The Police Chief is also given authority and responsibilities under ordinances of the City. This includes those which relate to the management, supervision and efficiency of the Police Department, i.e., §§ 5.01 and 5.03, MGO. (cited above)

II. Balancing Respective Roles

As indicated by the statutes and case law, both the Common Council and the Mayor have certain statutory authority to regulate the Police Department. Such authority includes the establishment of general policies for the management and direction of the City and budgetary oversight to ensure sound fiscal management of City departments. For example, while the provisions of § 62.13 prevent the Mayor from ordering the appointment/discharge of a particular firefighter or police officer, the Mayor has the power to "direct the chief to hold a position vacant when he deems it in the best interest of the city, subject, of course, to the authority of the common council in mayor-council cities to reverse his directive and authorize the filling of the position. Section 62.09(13)(a)." Opinion of League of Wisconsin Municipalities dated October 7, 1976. Further, the Mayor and/or Common Council can establish municipal policies memorialized in Administrative Procedure Memoranda, resolutions or ordinances. These may include anti-harassment policies; residency restrictions; ethics codes and the like. The

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Pieritz v. Hartwig, 201 Wis. 450, 453, 230 N.W.2d 42 (1930), cited in 81 Atty. Gen. 1,5 OAG 1-93 (1993).

[4] The Wisconsin Supreme Court described the role of a police chief as follows:

"The chief is responsible for the discipline, good order and efficiency of the police department." Christie v. Lueth, 265, Wis. 326, 333 (1954).

authority the Mayor has as Chief executive and the authority that the Common Council may exert under § 62.11(5), Wis. Stats., is expansive

In determining the Mayor's appropriate role as head of the Police Department it is useful to identify the parameters, or outer limits, of the Mayor's authority. A first guiding parameter emphasizes that as chief executive and head of the Police Department, the Mayor has the authority to establish municipal policies. Such policies can be incorporated into administrative procedure memoranda (APMs). They may also be adopted as resolutions or ordinances by the Common Council. The second parameter logically suggests that the Mayor cannot so inject him/herself into the day-to-day operation of the Police Department as to become the "de facto" Police Chief. That would effectively co-opt the statutory authority of the PFC under § 62.13(3), Stats., to appoint the Chief of the Police Department. Relatedly, if a Mayor's directive fails to distinguish between orders regarding day-to-day operations of the Police Department and orders regarding significant departmental policies, a concern arises that the directive may be arguably construed as a de facto demotion. This, too, would effectively co-opt the statutory authority of the PFC under § 62 13(3) and (5)(j), Wis. Stats, to discipline or remove the Police Chief for just cause.

This same analysis would apply to the Common Council's authority under § 62.11(5), Wis. Stats., and the Police Chief's obligation to obey the lawful written orders of the Mayor and Common Council. It should be noted, however, that the Common Council's lawful written orders (via resolution or ordinance) are subject to Mayoral veto which requires a 2/3 vote of the body to override. In contrast, the Mayor's written order to a Chief is unilateral and requires no council action

IV. Authority of the Mayor/Common Council to order the Police Chief to cease the use of tasers or to withhold funds for use of tasers

The situation presented here is a knotty one:

- The statutory scheme under sec. 62.13, Stats., is a recognition that the functioning of the Police Department should be insulated from improper political influence;
- The Police Chief has the command of the Police Department under state law;
- Pursuant to state law the Police Chief is under the supervision of the Mayor as head of the Police Department and subject to all "lawful written orders" of the Mayor and Common Council
- The Common Council's authority under § 62.11(5) to manage and control public services and City finances and to legislate for the general welfare is extensive
- There is a clear statutory role for the Mayor and the Common Council which suggests that a Police Chief continue to be held publicly accountable, not merely through a potential disciplinary hearing before the PFC, but also through the "lawful written orders" of the Mayor and the Common Council.

Due to the overlapping areas of authority, these issues at times need to be addressed on a case by case basis. This is particularly true when the subject matter touches technical or specialized law enforcement subject or policing processes, procedures, equipment, techniques or standards. The matter of appropriate use of force and the appropriate level of force by a police officer (when the officer concludes some level of force is necessary) is a specialized and technical area of law enforcement. The Police Department has developed specific standards and training requirements for the use of force recognizing the Department's "legal and moral responsibility to use force wisely and judiciously." MPD Policy 6-200. In fact, the Police Chief is required under state law to have a written policy regulating the use of force:

> 66.0511 Law enforcement agency policies on use of force and citizen complaint procedures.
>
> * * * *
>
> (2) USE OF FORCE POLICY. Each person in charge of a law enforcement agency shall prepare in writing and make available for public scrutiny a policy or standard regulating the use of force by law enforcement officers in the performance of their duties.

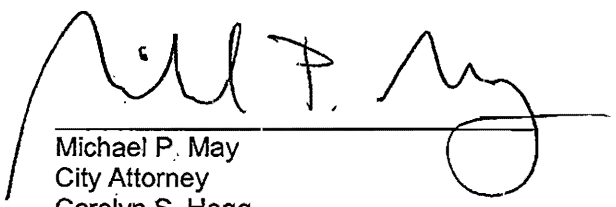
While the Police Chief has command of the Police Department under the direction of the Mayor and subject to the written orders of the Mayor and Common Council, it should also be recognized that the Police Chief brings to the position a policing expertise shared by neither the Mayor nor the Common Council.[5] This knowledge benefits the City not only with respect the health and safety of its citizens, but also with respect to liability for negligence. In his August 21, 1973 memo, City Attorney Edwin Conrad recognized the importance of the Fire Chief's expertise in light of the City potential liability for its own negligent acts:

> When the Common Council [or the Mayor] delves into technical matters involving firefighting and placement of equipment, it may be making a decision relating to fire fighting expertise which is ordinarily in the realm and knowledge of the Fire Chief. To the extent that the Common Council [or the Mayor] makes such a decision . . . . and this decision results in negligence upon the part of the City, a suit against the City based on such negligence may be forthcoming.

This is particularly so in the thorny area of use of force. On the one hand, a police officer has a privilege to use force which would otherwise be criminal when his/her conduct "is a reasonable accomplishment of a lawful arrest." § 939.45 (4), Wis. Stats. On the other hand, excessive use of force opens the door to a § 1983 Civil Rights lawsuit

CONCLUSION

Based on the foregoing, I conclude that the Common Council likely has the authority to adopt a resolution prohibiting the use of tasers by the police department. This conclusion is not without reservation, given the Police Chief's authority as commanding officer of the department and his statutory responsibilities to establish standards regulating use of force. Having the Council interject itself into areas which call for technical law enforcement expertise (either through a direct order prohibiting the use of tasers or via a budgetary action which prohibits expenditures for tasers) may not ultimately be the most prudent and safest course of action for officers and citizens alike. However, the Council's authority is not limited merely to those actions which outsiders might believe are wise or correct - otherwise its jurisdiction would be unnaturally narrowed indeed.



Michael P. May
City Attorney
Carolyn S. Hogg
Assistant City Attorney

Recommendation:

While the Common Council likely has the authority to adopt the Resolution before it, or even a stronger one, we would urge caution in substituting the Council's judgment for the expertise of the Police Chief in this area.

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[5]The Wisconsin court has acknowledged the technical expertise and unique importance of the role of Fire Chief in expansive terms: "In the case of the fire chief his abilities as a fighter of fire to preserve property and the safety of the community are considerations of great importance . . ." State ex rel. Davern v. Rose, 140 Wis 360, 370 (1909). Indeed, noting that under the laws of the time the mayor was reserved the right to suspend a fire or police chief, the court held:

> . . . [I]t is not the absolute duty of the mayor, even if informed of great or even gross dereliction in certain directions, *to momentarily deprive the city of the protection resulting from other abilities of such an officer as the fire chief or the chief of police.* Id.

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

Date: May 18, 2009

OPINION NO. 09-001

TO: Alder Michael Schumacher

FROM: Michael P. May, City Attorney

RE: **Alders and Personnel Matters before the Police and Fire Commission**

You have requested my opinion on the manner in which Alders could provide information or otherwise make their views known on matters related to the promotion of Police Officers, as recommended by the Chief of Police, and approved by the Police and Fire Commission (PFC). I will consider the question only as to Police Officers, although similar issues might arise with Firefighters.

Short Answer

As will be set out in detail below, I recommend that Alders utilize the existing system established by the Madison Police Department (MPD). Under this system, compliments, complaints or concerns about an officer's conduct are to be made in writing to the Chief of Police. Such communications become part of the employee's personnel file. The Police Chief and the PFC then review these matters at the time that the officer is considered for promotion.

There is also a more formal complaint process that any citizen may utilize; such complaints are handled by the Professional Standards & Internal Affairs Unit (PS&IA) of the MPD. It should be noted that the informal communications mentioned above may also trigger a PS&IA investigation, if the information provided implicates a possible rule violation. My understanding is that this investigatory/disciplinary process was not part of your inquiry.

Discussion

The question you raise is a mixed question of legal and policy determinations. Because of this, I will first discuss the law applicable to the situation you discuss, will then describe the current procedure for operation of the Police Department and the PFC with respect to personnel matters, and will finally explain why I make the recommendation outlined above.

Legal Attributes of the Police and Fire Commission

Under Wisconsin law, Madison is required to have a PFC. This is pursuant to Sec. 62.13 of the Wisconsin Statutes. By statute, the powers and operations of a PFC are a matter of statewide concern and may not be modified in any significant respect by municipalities. Sec. 62.13(12), Wis. Stats. In accordance with Sec. 62.13(4), Wis. Stats., chiefs appoint subordinates, both initial hires and promotions, subject to approval by the PFC.

One of the major purposes of a PFC is to remove the appointment and promotion of police officers and firefighters from the vicissitudes of political processes and municipal elections. *Conway v. Board of Police and Fire Commissioners of City of Madison,* 262 Wis. 2d 1, 20, 662 N.W. 2d 335 (2003), citing *State ex re. Pieritz v. Hartwig,* 201 Wis. 450, 230 N.W. 42 (1930). It is to be "an impartial body that operates independently of the city itself …" and "is designed to prevent the board from operating as an agent of a city official or police or fire chief." *Heil v. Green Bay Police and Fire Commission,* 2002 WI APP 228, ¶ 14, 256 Wis. 2d 1008, 1016, 652 N.W. 2d 118 (2002), citing other cases. In furtherance of that, the PFC is given significant independence. It constitutes its own legal entity for purposes of suing and being sued. *Racine Fire and Police Commission v. Stanfield,* 70 Wis.2d 395, 402, 234 NW 2d 307 (1975). As such an independent entity, it also has its own legal counsel. When complaints are brought by the Chief of Police before the PFC seeking discipline or removal of an officer, the City Attorney represents the Chief of Police, while the PFC has its own attorney.

Moreover, the Madison PFC is not a body which is entrusted with operating the Police or Fire Department. While some PFC's are given the "optional powers" set out in Sec. 62.13(6), Wis. Stats., Madison's PFC does not have those powers. Thus it is the Chiefs of Police and Fire who have the obligation for operational control of the departments. While these positions are subject to some oversight by the Mayor and Common Council under Sec. 62.09 (8) and (13), Wis. Stats., the chiefs enjoy a great deal of independence. This issue is explored in some length in a report prepared by our office with respect to a resolution on tasers offered some years ago. See Report of the City Attorney on Resolution ID # 00572, April 19, 2005.

In short, the Madison PFC operates as an independent personnel body with respect to matters before the Police Department.

PFC and MPD Procedures

In furtherance of the above legal guidelines and pursuant to the authority granted under Sec. 62.13 (4) and (5), Wis. Stats., the PFC has adopted rules to guide it in the exercise of its statutory responsibilities. These rules address the entry level hiring process as well as appointment to promoted ranks. In addition, MPD has developed a very specific procedure to assist the PFC in undertaking its personnel obligations. As mentioned above, the PFC must approve the recommendations of the Chief of Police

with respect to officer promotion or hiring. The PFC has additional obligations with respect to hiring.

As part of its management responsibilities, the MPD maintains a personnel file on each and every officer in the department. Comments that are received from any member of the public are collected within these files. The comments may be positive, negative, or merely neutral. If they are deemed relevant to future decisions with respect to the officer's advancement, they are maintained in the file. The MPD has developed a specific form – the "Officer Conduct Reporting Form" -- which may be used to provide these comments to the Department, the Chief of Police, and eventually the PFC. This form, together with a letter from the Chief of Police and a summary of the complaint resolution process, are available on the MPD website at:

http://www.cityofmadison.com/police/about/professionalStandards.cfm

A copy of those documents are attached.

Use of the personnel file in the decision-making process with respect to an officer's advancement has been formally incorporated into the promotional procedures of both the Police Chief and the PFC. Pursuant to an MOU between the Chief (City) and the MPPOA, the Chief's process for selection provides that each candidate's captain will review the personnel and complaint files as well as the resume for the candidate. In addition, the commanding officer of the candidate makes a presentation to the MPD Management Team to give a comprehensive picture of the candidate. This includes information in the candidate's personnel and complaint files. It is my understanding that this review has historically been part of the Chief's promotional process.

The PFC's rules with respect to appointments by promotion are set forth in PFC Rule 4.f. On the matter of personnel file review, the PFC's process is detailed and explicit:

> At each regular meeting of the Board, the Chief shall inform the Board regarding any promotional appointments which the Chief then intends to present to the Board at either of the next two Board meetings. During the interim between receiving that information and acting on the Chief's recommendation, any Commissioner by arrangement with the Chief may examine the complete personnel record of the prospective appointee. The Board shall act on recommendations of the Chief for promotional appointment at any regular or duly scheduled special meeting following such opportunity for examination of the appointee's record. PFC Rules and Regulations 4.f.v.

In practice, either some or all of the PFC actually review the entire personnel file for each officer being considered for promotion. The existing systems established by the MPD and the PFC ensures that compliments, complaints and concerns about an

officer's conduct can be folded into an orderly review process and given due consideration by both the Police Chief and the PFC at the appropriate stage.

I noted in my Short Answer to this opinion that my understanding is that the MPD and PFC disciplinary process was not part of your inquiry. Consequently, this opinion does not address that matter in any depth; I include only the following brief summary. There is also a specific and much more detailed procedure with respect to complaint proceedings seeking suspension, demotion or removal of a police officer. The procedure ensures the Chief of Police, as to MPD's investigatory process and disciplinary decision, and the PFC, as part of its quasi-judicial proceedings and final determination, comply with statutory requirements and satisfy the "seven just cause standards" in Sec. 62.13(5), Wis. Stats., as to any discipline imposed. Sec. 62.13(5), Wis. Stats., "provides procedural steps to be followed in proceedings against a member of a municipal police department"; "embodies the 'substantial elements' of a common-law hearing ... by providing for the filing of a written formal charge …, a public hearing at which the officer may be represented by counsel and may subpoena witnesses; and an appeal to the circuit court." The statutory procedure has been held by the Wisconsin Supreme Court "to meet the requirements of due process." *State ex. rel. Richey v. Neenah Police and Fire Commission,* 48 Wis.2d. 575, 580-81, 180 N.W.2d 743 (1970).

Finally, it should be noted that because of the legal nature and attributes of the PFC outlined above, it does not have the same procedures that many City committees have. There is no required public comment period before the PFC; Alders do not enjoy the right of participation at the PFC; it has adopted a series of rules and policies independent of those established by the Common Council for other City committees, which are considered arms of the Council or the Executive, or both. In one of the cases cited above, *Heil v. Green Bay Police and Fire Commission,* a liaison from the common council participated in discharge proceedings before the Green Bay PFC, but did not have the right to vote. The court held that the proceedings were void because the officer's due process rights had been violated by the participation of this outside person.

Recommendation:

Based upon the above-discussed legal limitations, I am very concerned about Alders appearing at meetings of the Police and Fire Commission and making statements about individual police officers, at least outside of a formal complaint proceeding. As with other citizens, Alders can certainly bring formal complaints if they believe it is warranted. However, appearance at these meetings begins to raise troubling questions of whether the Alders are -- in spirit if not in law – crossing the line of independence from political action that the PFC has been established to prevent. This concern is highlighted by the outcome in the *Heil* case mentioned above.

Alders may, as may any other citizen, submit comments to the Chief of Police with respect to the performance of any officer. Those comments are gathered and will be available to the PFC when it deliberates upon future personnel actions with respect to that officer.

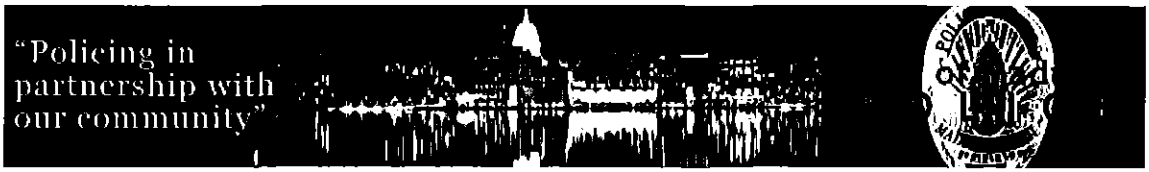
I recommend that the Council members take advantage of this existing MPD procedure. I further recommend that the comments actually be submitted in a written, paper document. While the MPD attempts to gather comments filed by email, it may be difficult in an individual case to determine a person's intentions; i.e., whether a person is commenting on an MPD policy, raising a concern or passing on a compliment about the performance of a particular officer, or simply complaining about something that may or may not actually reflect on the officer's conduct. Thus, a paper copy delivered to the Chief of Police will not be mistaken as having some other intention.

Michael P. May
City Attorney

Attachments

SYNOPSIS: Due to the independent nature of the Police and Fire Commission, Alders who desire to comment on the performance of police officers or firefighters should use the established process of filing written comments with the Departments.

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



City-County Building
211 South Carroll Street
Madison, WI 53703-3303
Phone: 608 266-4022
TDD: 608 266-6562
www.madisonpolice.com

Dear Citizen:

Thank you for contacting the Madison Police department to express your concerns. The Madison Police department is committed to investigating complaints in an open and fair manner with determining the truth as our primary objective. To assist us with this effort, please provide as much information as possible, including specific dates, times and the names of officers involved. State the reasons you believe the officer's conduct was inappropriate and provide us with the names of witnesses and how they can be contacted. It is especially important that you provide us with your contact information as well. You may use additional paper as needed.

Before completing and signing your statement, please read the section regarding confidentiality and select the statement of your choice. Your complaint and related documents are a public record and subject to disclosure upon a request for documents from the news media or any other person. The Department routinely discloses summaries of complaint investigations and their dispositions to the news media. If you request confidentiality, the Department will make every legal effort to respect your request. However, it is not possible to guarantee confidentiality.

It is also important to note that depending upon the nature of your complaint, it may not be necessary for you to submit your complaint in writing. Many citizen complaints can be more efficiently and appropriately addressed by speaking directly with the employee's Commanding Officer or Supervisor.

If you choose to submit your complaint in writing, you may mail it or drop it off in person at:

Madison Police Department Professional Standards
211 South Carroll Street (GR28)
Madison, WI 53703-3303

You may contact the Professional Standards and Internal Affairs Unit to discuss the nature of your complaint. The Internal Affairs sergeant can also answer any questions you may have about the process. The Professional Standards and Internal Affairs Unit is open Monday through Friday during regular business hours. The direct telephone line is (608) 266-6502.

You may decide to take your complaint directly to the Madison Police and Fire Commission (PFC). Forms for that purpose are available in the city Clerk's Office and the Mayor's Office. In some cases, the Department or officers involved may take your complaint to the PFC. Any proceedings before the PFC are public. Documents related to PFC proceedings are public records and are generally subject to disclosure under Wisconsin Law.

Lastly, the Department is required by State Law to inform you that, "**whoever knowingly makes a false complaint regarding the conduct of law enforcement officer is subject to a Class A forfeiture.**"

Sincerely,

Noble Wray

Noble Wray, Chief of Police

Enclosure: Complaint Statement Form

MADISON POLICE DEPARTMENT

Officer Conduct Reporting Form

Complainant and Contact Information

NAME			
ADDRESS			
CITY		STATE	ZIP CODE
HOME PHONE	WORK PHONE		CELL PHONE
STATEMENT GIVER IS ☐ Aggrieved Party ☐ Witness to Incident ☐ Other			

Involved MPD Personnel and Allegation

OFFICER(S) NAME AND/OR NUMBER
MPD CASE NUMBER (IF AVAILABLE)
DATE AND APPROXIMATE TIME OF INCIDENT
LOCATION
ALLEGATION(S)

Please attach a description narrative of the incident.

Please Read Carefully Before Signing

Choose one statement regarding confidentiality:

☐ I request my name be kept confidential.
☐ I request my name, address and phone number be kept confidential.
☐ I will not provide any information regarding this matter unless I am pledged confidentiality as indicated above.
☐ I do not request confidentiality in regard to this matter.

By signing the line below, I am affirming that I have read the letter from the Chief of Police pertaining to the complaint process and confidentiality; the details contained in my statement are true and correct to the best of my knowledge.

_____ _____
Signature Date

PS & IA USE ONLY			
DATE	EMPLOYEE	CR #	INTAKE NAME

HOW TO FILE A COMPLAINT

The Madison Police Department is committed to investigating complaints in an open and fair manner with truth as its primary objective. Therefore, this Department will accept complaints against its employees, policies or procedures, and investigate all such complaints to the appropriate disposition.

> Complaints will not be investigated if the complaint is received more than ninety (90) days after the alleged incident, except if the complaint involves an alleged criminal violation, or the complainant can show good cause for not making the complaint within the specified time limit.

COMPLAINT OPTIONS

Generally, citizens are encouraged to pursue their complaint through the internal process. However, you should know about both options available to you:

1. You may file a complaint with the Professional Standards Office within the office of the Chief of Police, or
2. You may file a complaint against a commissioned employee with the Board of Police and Fire Commissioners, as provided by State law. This is done by filing your complaint through the Mayor's Office, Room 403, or the City Clerk's Office, Room 103, both in the City-County Building.

COMPLAINT PROCESS

1. Call, write, e-mail, or stop by the Chief's Office in GR-28 of the City-County Building, 211 S. Carroll Street, Madison, WI 53703 (608) 266-6502.

   Complaints placed after 4:00 p.m. or on weekends should be directed to the Officer-in-Charge at (608) 266-4418.

2. Your complaint will be filed with the Professional Standards Unit, within the Executive Office. You will receive confirmation that your complaint has been received, and an indication as to whether your complaint will or will not be investigated.

3. Upon completion of an investigation, the Lieutenant assigned to investigate your complaint will make one of the following determinations:

Unfounded

The investigation conclusively showed the incident complained of did not occur, or that the individual named in the complaint was not involved.

Exonerated

The incident complained about did occur, but was justified, lawful and proper.

Non-Sustained

The investigation failed to reveal enough evidence to clearly prove or disprove the allegation.

Sustained

The investigation disclosed enough evidence to clearly prove the allegation.

The Chief of Police reviews all findings. When a finding of "sustained" is reported, the Chief will decide whether to take immediate corrective action or to forward the report to the commanding officer of the individual named in the complaint. Appropriate corrective action, which may include counseling, training, oral reprimand, written reprimand, suspension, demotion, or dismissal, may be taken. The Chief of Police will make the final determination.

> A notary public is available at the Madison Police Department at no charge.

INFORMATION NEEDED

The supervisor assigned to investigate your complaint will ask for the following information:

- Your name, address and phone number;
- The date and time of the incident about which you are complaining;
- The names, addresses, and phone numbers of any witnesses, if available;
- If the incident involves an arrest, the name, address, and phone number of the person arrested, if known;
- The name, badge number, and car number of the officer(s) involved, if known;
- Details of the incident that prompted your complaint.

The Madison Police Department is in compliance with the equal opportunity policy and standards and all applicable state and federal statutes and regulations relating to nondiscrimination in employment and service delivery.

MADISON POLICE DEPARTMENT
211 S CARROLL ST
MADISON WI 53703
Phone: (608) 266-4022
Fax: (608) 266-4855

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MADISON POLICE DEPARTMENT

COMPLAINT RESOLUTION PROCESS

The best way to insure that we have an honest and excellent police department is to first police ourselves.

Noble Wray, Chief of Police

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

Date: January 14, 2013

MEMORANDUM

TO: Mayor Paul Soglin

FROM: Michael P. May, City Attorney

RE: Legal Considerations Regarding Independent Investigation of Police Officer Involved Shooting Incident

Your office has received several letters or emails, apparently in a standardized form, asking for an "independent investigation" of the recent police officer involved shooting incident in which Madison Police Officer Stephen Heimsness shot Paul Heenan. You asked me for advice on the legal contours that might guide any consideration of such requests by the City. Because these requests are very recent, please consider this as a preliminary analysis. More legal issues may be identified if the City wishes to pursue this.

In the usual situation, where questions of the propriety of a police officer's actions are raised, the Madison Police Department (MPD) conducts an internal investigation. (If potential criminal conduct is at issue, a parallel criminal investigation is also undertaken by Madison Police detectives if the incident occurred in the City of Madison.) Specific officers are assigned for Professional Standards and Internal Affairs (PS&IA), and these officers regularly conduct numerous such investigations. Allegations of policy violations may cover a wide range of conduct from administrative infractions to use of force concerns and unlawful conduct. The PS&IA officers make recommendations to the Police Chief on discipline of officers. In rare circumstances the Police Chief has himself requested that the investigation (criminal and/or internal) be conducted by an outside entity. If the officer objects to the discipline, the matter may go to the Board of Police and Fire Commissioners, usually called the Police and Fire Commission (PFC).

In this case, because the incident involved a shooting of an unarmed citizen which resulted in the citizen's death, some members of the community are asking that an independent investigation – outside the normal MPD process – be conducted. As I understand the requests, some are asking that an independent review/investigation be conducted of the recent incident and some are also asking that such an additional oversight mechanism be made a permanent part of City government.

In examining the existing methods of independent investigation and review of police actions, it is important to distinguish between the investigation and determination to

prosecute criminal charges, and the internal MPD investigation and determination to bring misconduct charges. In my review of some of the letters, I was not clear what specific sort of independent review or investigation was being requested.

A. Existing Framework for an Independent Investigation or Review.

1. Police and Fire Commission.

The State of Wisconsin first provided for police and fire commissions at the end of the nineteenth century: in 1885 for Milwaukee, and in 1897 for second and third class cities. Madison has established a Police and Fire Commission (PFC) pursuant to sec. 62.13, Wis. Stats., and sec. 33.06, MGO. That body is independent of the Madison Police Department (MPD) and of the Mayor and Common Council. The PFC has citizen members each of whom serves a 5-year term. Sec. 62.13(5)(b), Wis. Stats., allows the police chief, a member of the PFC, the PFC as a body, or "any aggrieved person" to file a complaint with the PFC, asking that a member of the police department be disciplined, up to and including dismissal.[1] The PFC acts as a quasi-judicial body to conduct a hearing on any such complaint.

Thus, Wisconsin law has a specific procedure for an independent review of police officer actions, with the possibility of resulting discipline. Wisconsin has recognized that a purpose of the PFC is to remove actions regarding police and fire personnel from political pressures. As was noted by the Wisconsin Supreme Court in *State ex rel. Pieritz v. Hartwig,* 201 Wis. 450, 453 (1930):

> … it is common knowledge that the legislative act providing for the creation of the fire and police commission was enacted for the purpose of taking the administration of fire and police departments out of city politics, in order that 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. For this purpose a continuing body was created, only one of whose members should retire each year, which was to be composed of representatives of different political parties.

The *only* method in Wisconsin for discipline of a police officer is by the police chief or the PFC.

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1 The phrase "aggrieved person" appears to be more limited than "any citizen." The statute formerly allowed any "elector" to file a complaint, but this was changed to "aggrieved person." The exact scope of that phrase is not clear. Compare, for example, the rulings by the Madison PFC that this requires that the complainant have a particularized involvement in the circumstances of the complaint, more than merely a member of the public or an observer, *Lueders v. Riley* (September 30, 1998); *Greer v. Amesqua* (September 30, 1998), with the somewhat more expansive reading by the Wisconsin Supreme Court in analyzing similar language in the statute for the City of Milwaukee, Sec.62.50, Wis. Stats., *State ex rel. Castaneda v. Welch,* 2007 WI 103, 303 Wis2d 570, 600-601 (Wis. 2007).

Thus, under the authority that exists now in Wisconsin, an aggrieved person could file a complaint with the PFC, triggering a hearing on the actions of Officer Heimsness by the PFC, with the potential for discipline.

The PFC's authority to itself investigate or prosecute charges is less clear. As noted above, the PFC or a PFC member has the statutory authority to file a complaint, logically suggesting that such a decision would be preceded by some type of investigation. However, the PFC, as a quasi-judicial body, is also the body under the statute that would hear any charges against an officer. A question arises as to whether these two apparently conflicting statutory roles -- investigative body and prosecutor to determine if charges are warranted and quasi-judicial decision-maker -- could be fairly reconciled. Such dual roles may raise due process issues that would require a careful separation of investigatory and quasi-judicial roles. Some might perceive such dual roles as compromising the PFC's more usual role as the neutral body that sits in judgment of complaints brought before it. These same issues were noted in a recent memorandum to the Mayor from Scott Herrick, who serves as legal counsel to the PFC.

2. Review By District Attorney, Department of Justice or other Independent Office.

Despite the existence of the PFC, and the Police Chief's authority in the exercise of his discretion to reach out to other agencies in appropriate cases (as was done here with State Department of Justice, Division of Law Enforcement Services, Training and Standards Bureau), these letters appear to ask for something totally different – some sort of special prosecutor type of position to conduct an investigation. Contrary to some of the statements in the form letters, there *has been* independent review of the incident. The Dane County District Attorney, an elected official, independent of the MPD and the City of Madison, conducted his own review to determine if criminal charges were warranted. This review included requesting additional investigatory forensic information. Generally speaking, those decisions regarding criminal charges are entrusted to the District Attorney or a Grand Jury; any other sort of independent review could not result in criminal charges.[2]

In addition, MPD Police Chief Noble Wray asked for and obtained an independent review by the State Department of Justice, Division of Law Enforcement Services, Training and Standards Bureau, another entity independent of the City, the MPD and the Dane County District Attorney. The DOJ Training and Standards Bureau is the staff of the Law Enforcement Standards Board. It administers the programs of the Board for certification of law enforcement, jail and secure detention officers, of instructors, and of academies. It also coordinates and supports statewide training provided by the Department of Justice to the Wisconsin law enforcement community. The report of the

2 However, under sec. 979.04, Wis. Stats., the District Attorney or the County Coroner or Medical Examiner may petition for an inquest into the death of a person. Thus, the Medical Examiner is another source of independent review in the event of a death. My understanding is that the County Medical Examiner provided reports and findings to the District Attorney in his review of this matter. A Grand Jury inquiry would proceed under sec. 968.40, Wis. Stats.

DOJ was recently released by the MPD. Chief Wray also asked for and obtained a "shadow" of the MPD investigation by a member of the Dane County Sheriff's office, another independent elected office.

Thus, there has been, at some level, independent review by three independent entities looking at the incident. My understanding is that those calling for a further investigation or review assert that these agencies, closely aligned with law enforcement, cannot conduct a fair review.

3. Special Prosecutor.

Wisconsin law does not contemplate some sort of "special prosecutor" appointed by the City to pursue misconduct charges against police officers. The PFC is the method authorized under Wisconsin law. To the extent these letters to the Mayor's office want a change in state law, that is a policy issue to be examined in light of the present system and any proposed change.

B. Additional Options for the City.

The requests appear to desire some sort of independent review or investigation or both, but outside the existing methods under Wisconsin law, including the District Attorney, the Department of Justice, the Chief of Police and the PFC. Some cities have positions such as a "police auditor" or a separate review commission, but my quick review of some of them (Eugene and Knoxville, e.g.) showed that these bodies normally end up making a recommendation to the police chief on further action. They do not have authority to discipline an officer or make policy changes.

Cities have adopted a wide range of mechanisms for oversight of law enforcement conduct. One resource for examining the options – which usually include some form of an investigatory office or a civilian oversight board or both – can be found at the website of the National Association of Civilian Oversight of Law Enforcement, www.nacole.org. Civilian oversight was also examined by Professor Richard Jones in *Processing Civilian Complaints: A Study of the Milwaukee Fire and Police Commission,* 77 MARQ. L. REV. 505 (1994). This memorandum will not examine all of the permutations of such oversight bodies -- for example, do such bodies exist when another independent body such as a PFC also exists? -- but simply note that they exist and present a range of possibilities and challenges. Chief Wray or others at the MPD or the State DOJ may be aware of other resources.

Among the options the City could consider are:

(a) establishing some sort of body or person to conduct an independent investigation or review of this specific incident;

(b) establishing such a body on a permanent basis, looking at the range of options used in other cities; or

(c) asking the Police Chief to institute a policy listing the circumstances under which the Police Chief is instructed to use an outside investigator or review.

If the Mayor or Common Council were interested in considering some of these options, our office would need to carefully examine the boundaries between the powers of the Mayor, Common Council and the Chief of Police. This is not always an easy legal question.[3] Under sec. 62.09(8)(d), Wis. Stats., the Mayor is the head of the police department; under sec. 62.09(13)(a), Wis. Stats., the police chief has command of the police department "under the direction of the mayor." The same section provides that the chief is to "obey all lawful written orders of the mayor of common council." Under sec. 62.11(5), Wis. Stats., the Common Council has the power to act for the health, safety and welfare of the public.

I think it very likely that these statutes allow the Mayor or Council or both to establish some sort of position or body to independently review actions of the police chief or the police department, depending on the powers and authority given to such a body. The competing legal interests presented by possible Mayor or Common Council actions instructing the Police Chief to establish policies regarding outside investigation of such incidents are explored in the City Attorney report on tasers referenced in footnote 3. We would want to be certain that any such independent position or body or policy statement did not invade the statutory authority of the police chief or the PFC. [4]

Assuming the Mayor, either alone or with the concurrence of the Council, could establish such an independent investigator (with or without an independent oversight body), the powers of that person or body would necessarily be limited to investigating and making a report. It could not pursue criminal or civil actions and could not itself change MPD policies. Discipline would remain with the Chief and the PFC.

This is an important point. Absent a change in state law, any oversight body would be limited to the question of the MPD's internal investigation, and could ultimately do nothing more than investigate, report and recommend.

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3 See, for example, the competing statutory authority and policy concerns discussed in the report prepared by the City Attorney in 2005, on a resolution to limit the use of tasers by the MPD, Legistar ID No. 00572, which can be found here:

http://madison.legistar.com/View.ashx?M=F&ID=1745997&GUID=1DBC4D98-6B39-4A2E-87B1-BAACA37A91DD

4 I understand there is some precedent for this from the early days of the Soglin I administration, involving an outside review of issues surrounding new Police Chief David Couper. While the authority to create such an investigating body was not at issue in the case, the dispute in *Christie v. Lueth, 265 Wis. 326 (1954)* arose out of the recommendations made by a special investigating committee created by the La Crosse Common Council.

Given the limitations of such a new body and the existing mechanisms, whether such an independent review body should be established -- either on an ad hoc basis in this instance, or as a permanent feature of City government -- is a policy question raising a number of issues, including the expertise required to review actions of police officers. I leave those difficult matters to the policymakers to consider. If either the Mayor or Council were interested in pursuing this, I recommend asking the Police Chief, who likely has significant knowledge of the range and most effective types of outside review of police actions, for options or recommendations on how to proceed.

Finally, if the City were to examine the option of some sort of new type of independent review, I raise two important, fundamental questions that must be considered: What does the City want this independent mechanism to do? What will be its mission or purpose? Answers to those questions are critical in determining the nature of the mechanism.

C. Conclusion.

Wisconsin law currently provides a number of methods for independent review of actions of police officers, the most significant being the independent Police and Fire Commission. The District Attorney, Department of Justice and other law enforcement agencies such as the Dane County Sheriff's office could also provide independent review. The Chief of Police could be asked to establish a policy determining when and how an independent review would be requested. If the City wishes to look beyond these existing resources, the City could set up an office or panel for such investigation and review, but that office or panel could only investigate, report, and make recommendations to be considered by others. Almost anything beyond this would require a change in state law.

CC: Chief Noble Wray
Chief Steven Davis
Asst. Chief Randy Gaber
Lt. Dan Olivas
Scott Herrick
Assistant City Attorney Carolyn Hogg
All Alders