

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

Date: June 30, 2016

OPINION NO. 2016-001

TO: Alderperson Marsha Rummel

FROM: Michael P. May, City Attorney

RE: City Attorney Representation in Complaints Filed at the Police and Fire Commission

You inquired whether the City Attorney could represent members of the Common Council if they filed a complaint at the Board of Police and Fire Commissioners (PFC) against the Chief of Police. Our office has addressed the ability of the City Attorney to represent various parties before the PFC on several occasions, but we have never issued a comprehensive formal opinion on the topic. Because the question you asked is only part of the picture, and because this may be a recurring issue, we are issuing this broader formal opinion.

Questions Presented

1. If charges are brought by an “aggrieved person” (a civilian individual) against a police officer (including the Police Chief) at the PFC, does the City Attorney represent the person bringing the charges or the officer respondent?
2. If the Police Chief brings charges against a police officer at the PFC, does the City Attorney represent the Police Chief?
3. If the Mayor brings charges against a police officer (including the Police Chief) at the PFC, does the City Attorney represent the Mayor?
4. If the Common Council brings charges against a police officer (including the Police Chief), at the PFC, does the City Attorney represent the Council?

Short Answers

1. The City Attorney never represents the respondent officer at a PFC proceeding. The officers obtain their own attorney and, under some circumstances, the City may be responsible for the costs of the officer’s defense. Because the aggrieved person is acting in a private capacity, the City Attorney would not represent him or her.

2. Yes, the City Attorney normally represents the Chief of Police when the Chief brings charges against an officer before the PFC. This is considered formal action by the City through its agent.

3. Charges brought by the Mayor, who is head of the Police Department, also are formal actions of the City or its agents, and the City Attorney would normally represent the Mayor in the PFC proceedings. There may be situations, including one where charges are brought against the Police Chief, where the ethical obligations in the Rules of Professional Conduct for Attorneys would preclude the City Attorney from representing any persons before the PFC. In that instance, the City would need to retain special counsel to prosecute the charges. It is not clear if the Mayor could bring charges in his or her official capacity against officers subordinate to the Chief.

4. The Common Council is not an entity authorized to bring charges under the statute and case law. Individual Council members could bring charges, but they would be in the same position as any private person bringing charges under the first scenario. Therefore the City Attorney could not represent them in their individual capacities. The Council does have the authority to adopt a resolution directing the Police Chief or the Mayor to bring charges against an officer at the PFC.

Discussion

A. Statutes Involved.

There are myriad statutes involved in this analysis. I start with relevant provisions of the PFC statute, sec. 62.13, Wis. Stats. (2013-2014):

(5) Disciplinary Proceedings against subordinates.

(a) A subordinate may be suspended as hereinafter provided as a penalty. The subordinate may also be suspended by the commission pending the disposition of charges filed against the subordinate.

(b) Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a body, or by any aggrieved person. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

(j) The provisions of pars. (a) to (i) shall apply to disciplinary actions against the chiefs where applicable. In addition thereto, the board may suspend a chief pending disposition of charges filed by the board or by the mayor of the city.

Under sec. 62.09(8)(d), Wis. Stats.,

. . . the mayor shall be the head of the fire and police departments . . .

Under sec. 62.09(13)(a), Wis. Stats.,

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 orders of the mayor or common council.

Section 62.09(7)(e), Wis. Stats., provides:

Whenever a city official in that official's official capacity is proceeded against or obliged to proceed before any court, board or commission, to defend or maintain his or her official position, or because of some act arising out of the performance of that official's official duties, and that official has prevailed in such proceeding, or the council has ordered the proceeding discontinued, the council may provide for payment to such official such sum as it sees fit, to reimburse the official for the expenses reasonably incurred for costs and attorney fees.

Section 62.09(12)(a), Wis. Stats., says of the City Attorney:

The attorney shall conduct all the law business in which the city is interested.

See also Madison, Wis., Gen. Ordinances § 3.07(2015)

In the Wisconsin Rules of Professional Conduct for Attorneys, SCR 20:1.7 (2013-2014) is the general rule prohibiting conflicts of interest. It provides in part as follows:

Conflicts of interest current clients. (a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client, or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

SCR 20:1.13(a) and (g) are also relevant to our analysis:

Organization as client. (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

. . .

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of SCR 20:1.7.

B. The City is the Client of the City Attorney.

With a few exceptions, the City Attorney has only one client: the City of Madison¹. When the City's interests are aligned with employees or other public officials, the City Attorney (CA) may also represent those employees or other officials, so long as the matter is an official one of the City and not a personal one for the individual.

It is important to keep this distinction in mind, since it drives the answers to many questions of who the CA may represent.

C. An Aggrieved Person Files Charges Against a Commissioned Officer (Including the Chief of Police) at the PFC.²

Under sec. 62.13(5)(b) and (j), Wis. Stats., an "aggrieved person" may file charges against a subordinate officer or the Chief of Police. Aggrieved person is not defined, but this presumably would encompass a broad range of persons in the City.³

In such a proceeding, the individual person filing the charges has no official relation to the City such that the CA would be able to represent the person. This applies even to council members bringing charges in their individual capacity. Thus, the CA would not represent an aggrieved person bringing charges.

In addition, the CA could not represent a police officer, including the Chief, against whom charges are filed at the PFC. The person against whom the charges are made is called the respondent before the PFC. In such a circumstance, the respondent is not necessarily aligned with the interests of the client, the City of Madison. For example, if the PFC were to discipline or remove the respondent officer, the City's position would be to uphold the action of the PFC. This would be directly contrary to the interests of the officer, creating the conflict under SCR 20:1.7. Therefore, the CA cannot represent the respondent.

This result is supported by sec. 62.09(7)(e), Wis. Stats., cited above, which clearly anticipates that the City may be adverse to an officer who must defend his or her actions:

Whenever a city official in that official's official capacity is proceeded against or obliged to proceed before any court, board or commission, *to defend or maintain his or her official position*, or because of some act arising out of the performance of that official's official duties, and that official has prevailed in such proceeding,

¹ The most prominent exception is the Madison Community Development Authority (CDA), which is a separate body corporate and politic. The City Attorney represents the CDA pursuant to a directive from the Common Council and as embodied in an agreement between the City and the CDA.

² This memorandum addresses the various interests for police officers. The same rules would apply to firefighters before the PFC.

³ This memorandum does not address the scope of "aggrieved person" under the statute.

or the council has ordered the proceeding discontinued, the council may provide for payment to such official such sum as it sees fit ...

This would apply to any respondent in proceedings before the PFC,⁴ and the statute recognizes that the City could be adverse, if it decided to order the proceeding discontinued.

There are other statutes that provide for the CA to represent city officials, but they are inapplicable here. For example, sec. 62.115 and sec. 895.46, Wis. Stats., both apply to “actions” or “proceedings” that have been interpreted to be civil court cases only. *E.g.*, *Crawford v. City of Ashland*, 134 Wis.2d 369, 396 N.W.2d 781 (Ct. App. 1986). Section 895.35, Wis. Stats., might apply, but like sec. 62.09(7)(3), it is a statute that assumes the officer retained his or her own attorney and asks the municipality for reimbursement after the fact. It does not call for representation by the CA.⁵

Thus, in this scenario, the role of the CA is clear: The CA does not represent the aggrieved person, and the CA does not represent the officer who is a respondent. Indeed, there are times during such proceedings that the CA appears on behalf of the City when other officers or city officials are called as witnesses.

D. The Chief of Police Brings Charges Against a Subordinate.

The PFC statute explicitly provides that the Chief may bring charges. Sec. 62.13(5)(b), Wis. Stats. In such circumstances, the Chief is acting on behalf of the Department and the City. The CA has, and will continue to represent the Chief in such cases.

This memorandum does not address the representation of the PFC were the Board itself to bring charges, as contemplated by the statute. We are not aware of any instance where the Board has brought charges, and we understand the Board’s reluctance to act as both prosecutor and judge in the same case – despite the blessing of the law.

E. The Mayor Brings Charges Against the Chief of Police.

The PFC statute explicitly contemplates the Mayor bringing charges against the Chief of Police, sec. 62.13(5)(j), Wis. Stats. In such a situation, the Mayor, as head of the Police Department and as the city official explicitly authorized to bring such charges, would be considered acting on behalf of the Department and the City. The CA would normally represent the Mayor in such an action.

It is not as clear that the Mayor could bring charges against other officers. Presumably, the Mayor could be an aggrieved person, but in that case the Mayor would not be acting

⁴ Or in certain other proceedings, such as a *quo warranto* action.

⁵ The City’s collective bargaining agreement with the Madison Professional Police Officers Association has for a number of years provided that the City will reimburse an officer who is successful before the PFC. This is a contractual right that goes beyond what is provided by statute, and does not allow the CA to provide representation.

as head of the Department. At this point, I do not consider it necessary to determine if the Mayor could bring charges in an official capacity against subordinate police officers, such that the CA would represent the Mayor.

Although the CA would normally represent the Mayor in these circumstances, there might be circumstances where the CA would have a disqualifying conflict of interest due to having advised the Chief of Police on a course of action that is the subject of the charges, or other relationships with the Chief that would suggest a conflict. Even though the Chief is not a client because he does not represent the City when he or she is a respondent, a conflict could arise under SCR 20:1.7(b), cited above. Prior relationships with the Chief might cause the “significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to . . . a former client”⁶ If there was a disqualifying conflict of interest, the City would have to retain outside counsel to pursue the charges at the PFC.

I conclude that the CA would represent the Mayor if the Mayor brought charges against the Chief of Police, subject to determining if a conflict existed under SCR 20:1.7.

F. The Council Brings Charges against the Chief of Police.

The Council itself is not a legal entity, at least not one that can sue and be sued. “The mayor and alderpersons shall be the common council.” Sec. 62.11(1), Wis. Stats. When the Common Council acts, it does so by resolution or ordinance, and such action is considered action of the City of Madison as a legal entity. I conclude that the Common Council, as such, may not bring charges before the PFC.

This conclusion is supported by the language of sec. 62.13, Wis. Stats., which authorizes those who may bring charges, and never mentions the Common Council. By naming those who can bring charges, the statute presumably means that others may not. As noted above, members of the Council may, in their individual capacities, file charges as an aggrieved person, but the CA would not appear for or represent them before the PFC.

This conclusion is also supported by *Christie v. Lueth*, 265 Wis. 326, 61 N.W.2d 338 (1953). In this case, the Council passed a resolution directing the Mayor to fill vacancies on the PFC, and directing the Chief of Police to bring charges (again) against Officer Christie. A lawsuit was commenced by Officer Christie to prevent the Mayor and Police Chief from proceeding against Christie, and the court rejected the lawsuit. To the contention that the council was invading the executive’s function, the Wisconsin Supreme Court said this:

Appellant contends next that by the resolution the legislative branch of the city government invaded the executive and judicial prerogatives in violation of the

⁶ SCR 20:1.11(f) allows the CA to avoid disqualification by imputation through use of an appropriate screening device. This memorandum does not address whether such a method might be used to avoid the disqualifying conflict noted.

constitutional principle of the independence of the three branches. The common council has not attempted to perform any of the functions of the other divisions of government. It has pointed out what it considers the duty of the executive officials, the mayor and the chief of police, and directed them to get busy.

Id. at 331. Thus, the Council is not to step into the shoes of the Mayor or Chief of Police in actions before the PFC, but it may direct them to bring such an action.

The Court went on to say:

An examination of the resolution shows: (1) That the chief of police is directed to commence proper proceedings by the filing of charges to be prosecuted by the city attorney. The chief is responsible for the discipline, good order and efficiency of the police department, As such, it is one of his duties to file charges against departmental offenders when he considers their conduct is detrimental to the public service.

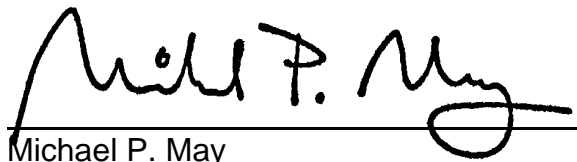
. . .

The city attorney shall conduct all the law business in which the city is interested. . . . He is the logical and proper official to prosecute such charges as may be filed by a department head against a subordinate. There may be occasions when his duty lies elsewhere

Id. at 333. This ruling supports our analysis that the CA should represent the Chief or the Mayor when charges are brought, and that the Council as a body cannot bring charges. The Council may, however, direct that the executives “get busy” and carry out their duties by filing such charges. The Council would do this by a resolution, just as was done in the *Christie* case.

Conclusion.

In nearly all proceedings before the PFC, the City Attorney will represent the city official – the Chief of Police or the Mayor – who brings the charges. The City Attorney generally will not represent any other parties before the PFC.



Michael P. May
City Attorney

SYNOPSIS: Review of which parties may be represented by the City Attorney in proceedings before the Police and Fire Commission.

CC: Mayor Paul Soglin
Maribeth Witzel-Behl

All Alders
Police Chief Mike Koval