



MEMORANDUM

TO: Public Safety Review Committee
President's Work Group on Police & Community Relations

FROM: Representative Chris Taylor

DATE: May 8, 2017

RE: Powers of Madison Common Council to set police "use of force" standards

CC: Marci Paulsen, City Attorney
Heather Allen, Legislative Analyst

I am writing in response to the April 27, 2017 memorandum from Assistant City Attorney Marci Paulsen regarding the Draft Report of the Common Council Executive Committee Subcommittee on Police and Community Relations (the President's Work Group on Police & Community Relations). Specifically, I will address the conclusions provided under "Action Item 3" and "Action Item 4" that "it is not within the purview of the Common Council to direct MPD to update its use of force and deadly force policy to incorporate the duty to intercede and de-escalation a situation."

After an extensive examination of state statute and case law by both the state legislature's Legislative Council and my legislative office, we could not find any definitive prohibition on a city council, such as the Madison Common Council, providing direction to the police chief regarding use of force policies.¹ The broad statutory authority specifically delegated to the Madison Common Council suggests it could indeed provide direction regarding specific use of force policies to the police chief.

In a Legislative Council memo I have attached, Legislative Council Attorney David Moore states that "the police chief, PFC, mayor, and common council all possess authority over various aspects of the police department." Specifically, the common council has the power "to issue the police chief orders, which it may expect the police chief to follow." Wis. Stat. § 62.09(13) requires the police chief to "obey all lawful written orders of the mayor or common council."

The scope of such orders may be broad based. The statutory powers delegated to city councils under Wis. Stat. § 62.11(5) are broad and, unless specifically limited elsewhere in law, include "the management and control of the city property and finances" and "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." Common councils are also provided with broad powers to employ various methods, including by regulation, to carry out this broad charge. Although use of force policies certainly have technical and operational components, they also implicate important policy questions.

¹ The City of Milwaukee, the only first class city in Wisconsin, and cities that have granted their board of police and fire commissioners optional powers under s. 62.13(6) are outside the scope of this Memorandum. Madison has not voted by referendum to allot the Police and Fire Commission additional "optional" powers.

Legislative Council concluded that “whether a common council could compel the city’s police department to make changes to the police department’s use of force policies raises a question that concerns an area of overlapping authority, which neither the statutes nor case law specifically address. It appears that nothing in Wisconsin law would prohibit a common council from using its broad policy-making authority to act on behalf of the health, safety, and welfare of the public to enact an ordinance or resolution to provide direction to the city’s police department with respect to its use of force policy.”

Attorney Paulsen seems to entirely rest her conclusion on Wis. Stat. § 66.0511(2), which directs “each person in charge of a law enforcement agency” to prepare a written use of force policy. I agree that this statute places an obligation on police chiefs to prepare use of force policies, but nothing in the way this obligation is phrased suggests that other decision makers who have authority over the police or who share responsibility for ensuring the health, safety, and welfare of the public are precluded from providing direction or approving these policies.”

Municipalities throughout our state refer to this statutory power of requiring the police chief to obey all lawful orders of the common council in routinely requiring municipal approval of police department rules, regulations and policies.² Though the Madison Common Council currently exercises no such oversight of which we are aware, common council oversight of police policies is commonplace throughout Wisconsin. Attorney Paulson’s statement is contrary to the commonplace interpretation and actions by municipalities throughout the state where common councils review, direct and approve the administrative and policy positions of police departments.

State statutes confer very broad powers to common councils to manage and control all aspects of city government, unless expressly limited by statute. Wis. Stat. § 62.11(5). There is nothing in the state statute or case law to remove the broad power of the common council to act for the benefit of the public in setting police use of force standards. Attorney Paulson’s analysis is conclusory and fails to acknowledge both that control over law enforcement is an area of overlapping authority and that this particular issue is a novel one.

² Many localities require the approval of their policy making bodies on rules, regulations and policies promulgated by their police chief, including the City of Markesan, the Village of Oregon, the Village of Johnson Creek, the Village of Darien, the city of River Falls, and the city of Darlington, to name a few.