

AGENDA # _____

CITY OF MADISON, WISCONSIN

REPORT OF: City Attorney

PRESENTED
REFERRED

April 19, 2005

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 _____
RULES SUSPENDED _____
ID NUMBER _____

POF _____

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.

¹ An interesting illustration of the various roles - quasi-judicial, administrative, executive, legislative - appears in the case of Christie v. Luefh, 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.

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 Department⁴ 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

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.

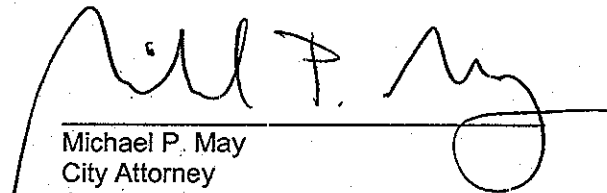
While the Police Chief has command of the Police Department under the direction of the Mayor and subject to the written orders of the Mayor and Common Council, it should also be recognized that the Police Chief brings to the position a policing expertise shared by neither the Mayor nor the Common Council.⁵ This knowledge benefits the City not only with respect to 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's 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.



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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.

⁵The 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.