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Patricia V. Gehler

MEMORANDUM

TO: Public Safety Review Committee Members

FROM: City Attorney Michael Haas

DATE: May 11, 2021

RE: Responsibilities of Police and Fire Commission, Public Safety Review Committee and Police Civilian Oversight Board

This memorandum summarizes the roles and responsibilities of the Public Safety Review Committee (PSRC), the Police and Fire Commission (PFC), and the Police Civilian Oversight Board (COB). Each body has separate but related responsibilities established by Wisconsin Statutes and Madison General Ordinances. While the lanes of authority are defined in the law, some aspects of the working relationship among the bodies will become clearer when the new Oversight Board and Independent Monitor start to work through their procedures and initiatives.

Public Safety Review Committee

The PSRC is a regular standing City Committee created by Madison General Ordinance § 33.22. It is composed of nine members, including a designee of the Mayor, three Alders, five resident members, and one alternate resident member. The duties of the PSRC are described in MGO § 33.22(4) as follows:

(4) Duties The work of the Public Safety Review Committee shall be advisory to the Mayor and the Common Council to assist them in the performance of their statutory duties regarding the police and fire departments. The role of the Public Safety Review Committee shall in no way interfere with the lawfully prescribed powers and duties of the Common Council, the Police and Fire Commission, the Mayor, or the Chiefs of the respective Police or Fire Departments. The Public Safety Review Committee may, in the performance of its duties:

(a) Review service priorities and capital budget priorities of the Police and Fire departments;

(b) Serve as liaison between the community and the City on public safety issues;

(c) Review annually and make recommendations to the Mayor and the Common Council regarding the annual work plans and long-range goals of the departments.

Several observations may be made based on this ordinance's description of the PSRC. First, it is an advisory body and its actions may result in recommendations to the Common Council and Mayor. Also, it does not have authority to interfere with the statutory duties of the PFC. Second, the ordinance directs the PSRC to serve as a liaison between the community and the City regarding public safety issues which is a role similar to that assigned to the Civilian Oversight Board. Depending upon the focus and initiatives of the two bodies, there may be some overlap in the functions of the PSRC and the COB. A logical division of duties between the COB and the PSRC could lead to greater efficiency and effectiveness in addressing police issues.

It is also possible that the role of the PSRC may evolve with the creation of the COB, either due to the Council reviewing the charge of the PSRC or to the PSRC altering its own focus. In 2020, for instance, the PSRC spent significant time considering the "8 Can't Wait" recommended practices, MPD's response to demonstrations and subsequent violence, and the recommendations of the Ad Hoc Committee on Police Policies and Procedures. The PSRC recently recommended that the Council refer the MPD Policy and Procedure Review Ad Hoc Committee's recommendations to the COB, and there may be other topics the COB considers which would previously be under the jurisdiction of the PSRC.

Lastly, I would note that, except for the PFC's authority regarding hiring, promotion, discipline and discharge of commissioned officers, the PSRC is sole committee with jurisdiction over broader issues related to the Fire Department's budget and service priorities.

Police and Fire Commission

Of the three bodies, the PFC is the only one that draws its authority from state law. Wis. Stat. Section 62.13 establishes the authority, responsibilities and membership of the Commission. The PFC is made up of five resident members appointed by the Mayor for five-year terms.

In short, the PFC is the only body responsible for the hiring, promotion, discipline and termination of commissioned officers and the Police Chief and Fire Chief. It does not set policy or oversee the day-to-day management of the Police or Fire Departments. The PFC appoints the Police Chief and Fire Chief. The Chiefs appoint sworn officers subject to the approval of the PFC. The PFC may also suspend, reduce in rank, or remove a commissioned officer from MPD or MFD after a hearing that establishes just cause, which requires notice of the charges against the officer as well as an opportunity to respond.

Civilian Oversight Board and Independent Monitor

In September 2020, the Common Council created the position of Independent Monitor in MGO § 5.19 and the Police Civilian Oversight Board in MGO § 5.20. These entities were designed to provide greater community oversight of the Police Department's policies,

procedures and disciplinary actions. The COB is made up of 11 regular members and two alternates who serve staggered 4-year terms, except for some of its initial members who serve a shorter term. Members are appointed and confirmed by the Mayor and Common Council, although 9 of the members must be chosen from list of nominees submitted by designated organizations.

The duties of the COB are outlined in MGO 5.20(9), and they include

- 1) appointing and supervising the Independent Monitor;
- 2) evaluating the effectiveness of the Monitor's Office;
- 3) conducting an annual review of the Police Chief;
- 4) conducting community outreach;
- 5) making policy recommendations related to discipline, use of force, hiring, training, and community relations;
- 6) publishing an annual report regarding the Board's activities, the work of the Independent Monitor, concerns expressed by community members, the Board's assessment of MPD investigative and disciplinary processes, and recommendations for ways that MPD can improve its relationship with the community as well as changes to MPD policies and processes; and
- 7) issue subpoenas if necessary to fulfill its duties.

The Oversight Board is in the process of hiring an Independent Monitor, who will oversee two additional staff members. The Independent Monitor's duties include:

- 1) monitoring MPD compliance with its own procedures and progress towards the recommendations in the OIR Report and report of the MPD Policy and Procedure Ad Hoc Committee;
- 2) monitoring MPD audits of its programs and activities, use of force incidents, and personnel investigations;
- 3) conducting independent investigations of MPD personnel;
- 4) making recommendations to the Police Chief regarding disciplinary action;
- 5) referring cases to the PFC so that it may consider initiating disciplinary action;
- 6) appointing legal counsel to provide representation to parties pursuing complaints before the PFC;
- 7) making recommendations regarding MPD policies and addressing issues of concern to the community;

- 8) assisting the COB in its annual review of the Police Chief;
- 9) conducting community outreach;
- 10) staffing the Oversight Board;
- 11) hiring staff and independent contractors;
- 12) reviewing MPD records and data;
- 13) issuing subpoenas;
- 14) issue reports and policy recommendations to City officials;
- 15) retain independent legal counsel; and
- 16) issue an annual report and additional public reports.

Relationship Between PFC and COB

During the formation of the COB, there was significant discussion regarding the potentially overlapping roles of the PFC and the COB. Rather than try to summarize that public debate, I am attaching three documents which describe the PFC and its relationship to the COB – correspondence from PFC legal counsel Jenna Rousseau and from UW Law School Professor and COB Member Keith Findley, and a memorandum from the Wisconsin Legislative Council, which serves as legal counsel to the Wisconsin Legislature.

These documents outline in detail the authority and procedures of the PFC and how they relate to the work of the COB, and it would be repetitive to duplicate those explanations here. These documents also illustrate the public discussion and debate which occurred prior to the creation of the COB and the Independent Monitor position by the Common Council. In particular, the correspondence from Attorney Rousseau and Professor Findley provided a greater community understanding of the relationship between the PFC and the COB, and also established a common set of expectations regarding the extent of the Board's authority.

The key point to keep in mind is that the Civilian Oversight Board may review, consider, and gather public input regarding a wide variety of policies and decisions of the Police Department and the PFC, but the Board's authority generally culminates with the ability to make recommendations to MPD and the PFC. As stated in Professor Findley's correspondence, the Board

...will have no authority to impose discipline, reverse disciplinary decisions, or mandate any other response by the Madison Police Department, the PFC, or any other body with statutory or ordinance-based authority over these matters. Their role will instead be simply to compile data and evidence and make *recommendations* based on what they find.

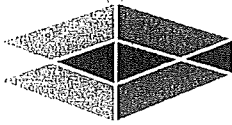
The Board's ability to effectively gather and synthesize public input and to thoroughly examine police practices, policies and issues is a task of the COB as outlined within the

May 11, 2021

Page 5

Ordinance. At times it may disagree with actions of MPD or the PFC, or it may seek changes that are not permitted under applicable law or that are out of the control of MPD or the PFC. But, as Professor Findley also noted, the COB may also serve to assist or complement the work of the PFC by “providing a method for investigating and developing facts in a regularized fashion, appointing counsel and making recommendations (not final judgments) to the PFC.” This is a responsibility the Board may exercise whether it is examining disciplinary policies, collecting public feedback regarding the Police Chief’s performance, creating its annual report, or reviewing policies that are not under the PFC’s purview.

I hope this information is helpful and I will be available at the PSRC meeting to answer any questions.



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VIA E-MAIL

June 12, 2020

Michael Haas, City Attorney
City Attorney's Office
210 Martin Luther King, Jr. Blvd., Room 401
Madison, WI 53703

Dear Attorney Haas:

I serve as general legal counsel to the Board of Police and Fire Commissioners of the City of Madison (PFC). I recently reviewed a proposed resolution regarding creation of an MPD Ad Hoc Recommendation Oversight Committee/Independent Civilian Oversight Committee and a proposed ordinance regarding creation of an Independent Police Auditor position within the Madison Police Department.

The purpose of this letter is to outline my concerns regarding potential encroachment on the statutory authority of the PFC under Wis. Stat. § 62.13. However, I also wanted to express my willingness, on behalf of the PFC, to meet with the Committee(s) (and other stakeholders) currently considering these changes. The President of the PFC, Nia Trammell, is also willing to meet.

The PFC consists of five (5) citizens. It is an independent body created under Wis. Stat. § 62.13. Under this statute, the PFC has powers and duties regarding hiring, promotion, and major discipline of police and fire personnel.

With regard to the police chief and fire chief positions, Wis. Stat. § 62.13(3) provides that the PFC "shall appoint the chief of police and the chief of the fire department or, if applicable, the chief of a combined protective services department, who shall hold their offices during good behavior, subject to suspension or removal by the board for cause."

With regard to hiring of subordinates, the PFC has the following powers and duties:

- Approval of eligibility lists consisting of candidates who have met the requirements for the position.
- For the purpose of creating eligibility lists, the PFC "shall adopt, and may repeal or modify, rules calculated to secure the best service in the departments" which

“shall provide for examination of physical and educational qualifications and experience, and may provide such competitive examinations as the board shall determine, and for the classification of positions with special examination for each class.”

- The examination “shall be free for all U.S. citizens over 18 and under 55 years of age, with proper limitations as to health and, subject to ss. 111.321, 111.322, and 111.335, arrest and conviction record. The examination, including minimum training and experience requirements, shall be job-related in compliance with appropriate validation standards and shall be subject to the approval of the board and may include tests of manual skill and physical strength. All relevant experience, whether paid or unpaid, shall satisfy experience requirements.”
- The PFC “shall control examinations and may designate and change examiners, who may or may not be otherwise in the official service of the city.”
- Approval of all candidates recommended for initial hire by the police chief or fire chief.

The PFC has adopted detailed rules governing the initial appointment process, including, but not limited to, rules regarding the application process, examination process, and background check process. The PFC monitors the development of the eligibility lists and carefully considers the procedures and criteria used by the chief in developing hiring recommendations based on the eligibility lists. For instance, the PFC customarily requests a statistical analysis of various demographic characteristics, including age, race, sex, educational level and field of study, language proficiency, and previous professional experience. The PFC also has the authority to approve the chiefs’ final recommendations for appointment following completion of the applicable probationary period.

With regard to promotions, the PFC has the statutory authority to approve all recommendations for promotion by the police chief or fire chief. The PFC has adopted rules governing the promotion process, including a probationary period for all promotional appointments. For each candidate recommended for promotion, the PFC assigns at least one Commissioner to review the personnel file and any PS&IA files. The Commissioner assigned to examine the candidate’s file(s) then makes a recommendation to the PFC at the next regular meeting of the PFC. In addition, the PFC customarily invites candidates for promotion to command-level ranks to an informal lunch (noticed as a Special Meeting) to conduct a more complete review of the recommendation.

With regard to disciplinary action against subordinates, the PFC has the following powers and duties:

- Suspension of a subordinate pending the disposition of charges.
- Hear charges (or a complaint) filed against the subordinate, make findings, and impose penalties consisting of suspension or reduction in rank, suspension and reduction in rank, or discharge.
- In order to impose penalties, the PFC must determine that just cause exists to support the charges (or complaint) based on the seven (7) standards provided

under Wis. Stat. § 62.13(5)(em), to the extent applicable. The seven (7) standards are as follows:

- 1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
- 2. Whether the rule or order that the subordinate allegedly violated is reasonable.
- 3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
- 4. Whether the effort described under subd. 3. was fair and objective.
- 5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
- 6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
- 7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

A disciplinary matter is normally commenced before the PFC when charges (or a complaint) are filed by the chief or an "aggrieved person" (which may include a citizen if he or she is an aggrieved person). The PFC has adopted detailed rules governing the charge/complaint process and hearing process. If a complainant files charges (or a complaint) against one or more officers, he or she must appear in person (or through his or her attorney or representative) for at least one hearing session, typically for more than one such occasion, in order to call witnesses, be subject to cross-examination, and generally to present his or her case. As a quasi-judicial body, the PFC does not directly or actively investigate or review complaints.

In light of the foregoing, the proposed resolution for creation of the MPD Ad Hoc Recommendation Oversight Committee/Independent Civilian Oversight Committee contains some features that appear to encroach upon the statutory authority of the PFC (and rules created by the PFC pursuant to statute). For instance, the resolution describes the following functions:

- "With input from the Independent Monitor, conduct an annual review of the Chief of Police to assess her or his performance in office, and submit a report to the designated City Officials responsible for completing the annual performance review of the Chief as recommended by the Ad Hoc Committee, **including recommendations as to whether the Chief has satisfactorily performed his or her duties or whether the Chief has failed to perform satisfactorily, thereby constituting 'cause' for referral to the PFC with a recommendation for dismissal.**" (Emphasis added in bold.)
 - The determination of whether "cause" exists to discharge a chief rests with the PFC, including the procedure(s) applicable to making this determination. Therefore, the bolded language is potentially problematic.

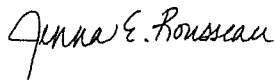
- “Make policy-level recommendations regarding **discipline**, use of force, and other policies; rules; **hiring**; training; community relations, and **the complaint process**.” (Emphasis added in bold.)
 - The hiring process for subordinates (as well as for the chiefs) is within the statutory authority of the PFC. The PFC also has detailed rules to address the hiring process and formation of eligibility lists. Thus, the bolded language regarding hiring is potentially problematic.
 - In addition, the process for imposing discipline with regard to subordinates is governed by Wis. Stat. § 62.13 and is within the statutory authority of the PFC. The PFC also has detailed rules to address the disciplinary process and charge/complaint process. Thus, the bolded language is potentially problematic.
- “Furnish an annual public report to the Mayor and Common Council regarding the board’s assessment of the work of the monitor’s office; the board’s activities during the preceding year; concerns expressed by community members; the board’s assessment of the police investigative and **disciplinary processes**; recommendations for ways that police department can improve its relationships with the community; and recommendations for changes to police department policies, rules, **hiring**, training, and **the complaint process**.” (Emphasis added in bold.)
 - See concerns above.
- “In order to determine whether the Monitor’s Office is effectively performing its duties and to make recommendations to the Chief of Police and Monitor’s Office regarding investigations, **determinations as to whether department rules or policies have been violated, and the appropriateness of disciplinary sanctions**, if any, the Board should receive regular reports from the Monitor’s office and should be allowed to review pertinent portions of the personnel files of personnel and PSIA files, including statements of personnel.” (Emphasis added in bold.)
 - The PFC must determine whether a rule or order has been violated, along with related considerations, for purposes of determining whether just cause exists to impose discipline. Thus, if another individual or body is performing this task, it will encroach upon the statutory powers and duties of the PFC.
 - In addition, the resolution does not address what the next step would be if the Committee and/or Monitor determines that a policy has been violated and discipline is warranted. For instance, who would file charges (or a complaint) before the PFC? Would that individual or body have standing to file charges or a complaint? Would the same individual or body investigate *and* prosecute the matter before the PFC?

The proposed ordinance to create the Police Auditor/Monitor position states that “the Police Auditor provides independent civilian oversight to Police Department operations to ensure police accountability to the public in an independent, unbiased manner.” Although the PFC does not have

general oversight or general supervision regarding day-to-day management of the police department, it seems likely that the Police Auditor's responsibilities will overlap with the PFC's statutory powers and duties in other ways. For instance, the determination of whether a subordinate has violated a policy or order, such that discipline should be imposed, ultimately rests with the PFC. The PFC determines, based upon charges (or a complaint) and a hearing, whether just cause exists to impose discipline. Therefore, certain aspects of the role of the Police Auditor may conflict with the statutory authority of the PFC.

Thank you for your time and consideration of this letter. Please let me know if there is any interest in scheduling a meeting to discuss this further. My direct telephone number is 844.833.0828.

Respectfully Submitted,
STRANG, PATTESON, RENNING, LEWIS & LACY, S.C.



Jenna E. Rousseau
Legal Counsel to the Board of Police and Fire Commissioners of the City of Madison

cc: Nia Trammell, President of the PFC (via e-mail)
Assistant City Attorney Marci Paulsen (via e-mail)



VIA E-MAIL

June 15, 2020

Jenna E. Rousseau
Strang & Patteson
660 W. Washington Ave.
Suite 303
Madison, WI 53703

Dear Ms. Rousseau:

I have reviewed a copy of the letter that you sent to City Attorney Michael Haas on June 12, 2020, raising concerns about the proposed ordinance to create an Office of Independent Monitor and Civilian Oversight Board. I very much appreciate your invitation to engage with members of the former Ad Hoc Committee that recommended these and numerous other reforms related to the Madison Police Department, after four years of study. I write to respond positively to that invitation, and to clarify the import of our recommendations and explain why those recommendations do not encroach upon the statutory authority of the PFC, but rather are designed to enhance and facilitate the PFC's ability to perform its duties.

As you will recall, I was a Commissioner on the Board of Police and Fire Commissioners at the time that I was also co-chair of the City's Ad Hoc Committee that generated the recommendations at issue. I was, accordingly, very aware of the responsibilities and authority of the PFC. I was also aware of the structural impediments that at times made it difficult for the PFC to exercise its authority as fully as many of the Commissioners, myself included, would have liked. I am a firm believer in the role of the PFC and I, along with my fellow Ad Hoc Committee members, wanted to find ways to help the PFC function as effectively as possible.

While I agree with you that it is important to respect and preserve the statutory authority of the PFC, I want to be clear that none of the recommendations our Committee made will intrude on that authority. The new Independent Monitor and Civilian Oversight Board will indeed work on matters that come within the purview of the PFC, but they will not intrude on the authority of the PFC because, unlike the PFC, they will have no authority to make decisions or issue directives related to the matters reserved to the PFC. While they will, for example, have responsibility to review disciplinary decisions and processes and conduct independent investigations, they will have no authority to impose discipline, reverse disciplinary decisions, or mandate any other response by the Madison Police Department, the PFC, or any other body with statutory or ordinance-based authority over

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these matters. Their role will instead be simply to compile data and evidence and make *recommendations* based on what they find.

This is how they will actually work to facilitate the work of the PFC. The PFC, as a quasi-judicial body, especially one with no staff (aside from your assistance as legal advisor), does not have the capacity to undertake its own investigations, and does not have the authority to review policy matters outside those set forth in the statutes. During my time on the PFC the other Commissioners and I, along with previous legal counsel, had a number of conversations about the challenges presented by the fact that the PFC primarily addresses disciplinary matters in a reactive way, responding to complaints filed by individuals who were often unable to advocate well for themselves because they did not have counsel. The Independent Monitor and Civilian Oversight Board that the Ad Hoc Committee has recommended help the PFC review disciplinary actions by providing a method for investigating and developing facts in a regularized fashion, appointing counsel, and making *recommendations* (not final judgments) to the PFC. The Monitor and Board will facilitate access to the PFC process, not replace it.

Let me respond to some of the specific concerns you raised.

- You raise concern about the authority of the Monitor and Oversight Board to make “recommendations as to whether the Chief has satisfactorily performed his or her duties or whether the Chief has failed to perform satisfactorily, thereby constituting ‘cause’ for referral to the PFC with a recommendation for dismissal.”
 - You are absolutely correct that the “determination of whether ‘cause’ exists to discharge a chief rests with the PFC, including the procedure(s) applicable to making this determination,” but the Ad Hoc Committee’s recommendations do nothing to change that. This recommendation does not purport to give the Monitor or Civilian Board authority to make a binding determination about “cause,” or to affect in any way the PFC’s procedures for making this determination. It instead provides a systematic mechanism for affected people in this community to gain access to that PFC process and enable the PFC to make that determination, when reasons for concern about the Chief’s performance might otherwise never be exposed or raised. All the Monitor and Advisory Board can do is monitor the performance of the Chief and bring concerns to the PFC to enable the PFC to perform its responsibilities as it sees fit.
- You raise concerns about the recommendation that the Monitor and Civilian Board “[m]ake policy-level recommendations regarding discipline, use of force, and other policies; rules; hiring; training; community relations, and the complaint process,” and about the recommendation that the Monitor and Oversight Board submit an annual public report to the Mayor and Common Council on those matters.
 - Again, of course, you are absolutely correct that the statutes give the PFC exclusive authority to make hiring and disciplinary decisions, and to

establish processes for both. But again, nothing in these recommendations changes that. All the Monitor and the Civilian Board can do is review those policy matters—and many other matters not within the purview of the PFC (such as use-of-force standards, policies on responding to individuals with mental health problems, and many more)—and make *recommendations*. None of the PFC's authority is invaded at all. To the contrary, this process just provides another avenue for community input to the PFC as it makes its determinations on those matters that are within its purview, and to other City officials with regard to the many more issues that the PFC does not handle.

- You raise concerns about those parts of the recommendations that would give the Monitor a role in assessing MPD determinations about department rule and policy violations and the appropriateness of disciplinary sanctions, and that would authorize the Monitor to access pertinent police files in order to do so. You write that “[t]he PFC must determine whether a rule or order has been violated, along with related considerations, for purposes of determining whether just cause exists to impose discipline. Thus, if another individual or body is performing this task, it will encroach upon the statutory powers and duties of the PFC.”
 - Again, however, nothing in this recommendation undermines or encroaches on the PFC's authority to make those determinations, because the Monitor is not given authority to make any determinations that have any binding effect. This is a watchdog role, not a disciplinary role. After full implementation of this recommendation, the PFC will remain the only body with authority outside the MPD itself to impose discipline or reverse disciplinary decisions. This recommendation envisions a broader, community-based inquiry than the PFC performs—examining disciplinary policies and practices holistically and examining whether police policies are adequate and effective. All this does, again, is give the Monitor the ability to make *recommendations*—to the MPD, the PFC, the Mayor, and the Common Council.
- You also raise concerns that “the resolution does not address what the next step would be if the Committee and/or Monitor determines that a policy has been violated and discipline is warranted. For instance, who would file charges (or a complaint) before the PFC? Would that individual or body have standing to file charges or a complaint? Would the same individual or body investigate *and* prosecute the matter before the PFC?”
 - But the recommendation (and attendant resolution) *does* spell out all that's needed in this regard: it makes clear that the Monitor has the authority to appoint counsel to help an individual file and prosecute a claim before the PFC. It does not authorize anything more than that, because it does not fundamentally alter the decision-making structures already in place. It just helps the community access those processes and stay informed about the work of decisionmakers. If the Monitor or Committee were to determine

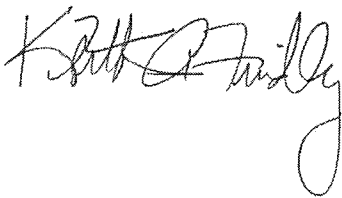
that a policy was violated or discipline were warranted, and an aggrieved individual was not interested in pursuing a complaint, then the Monitor/Committee's report and conclusion would serve to create a public record and foster public debate. That alone is an important tool in a democratic society, especially one ravaged with concerns about police/community relations.

Now, more than ever, our community needs as much community-member input into policing as can be accommodated without undermining the legitimate functions of the police. The PFC is an important part of the mechanisms for civilian oversight and civilian input into policing, and we have no desire to undermine the PFC's important work. Simply put, the Monitor and Oversight Board envisioned by our Ad Hoc Committee will help the PFC perform its duties more effectively, equitably, and comprehensively; they will not displace the PFC in any way. It would be a disservice to both the PFC and the MPD if we were to inhibit any initiative to make police oversight more effective, transparent, and responsive to community needs. It is never a good time to minimize community input into policing. This would be a particularly bad time.

Finally, I want to reiterate my willingness to engage further with you, President Nia Trammell (and the full Board of Police and Fire Commissioners), and the City Attorney on these matters. Our Ad Hoc Committee has now finished its work and has dissolved, and so cannot meet with you as a Committee. But I am confident that a number of the former Committee members would be happy to join these conversations as well. As you know, the Common Council is creating a three-member Alder Workgroup to finalize the ordinance drafting on these matters, so perhaps a joint meeting with that Workgroup would be most productive.

Please let me know how I can help as we address and discuss these important issues.

Sincerely



Keith A. Findley

Cc: Nia Trammell, President of the PFC (via e-mail)
Michael Haas, City Attorney (via e-mail)
Marci Paulsen, Assistant City Attorney (via e-mail)
All Madison Alders (via e-mail)

Wisconsin Legislative Council

Anne Sappenfield
Director



TO: REPRESENTATIVE CHRIS TAYLOR

FROM: Peggy Hurley, Staff Attorney

RE: Citizen Oversight and the Duties of the Police and Fire Commission

DATE: June 25, 2020

You asked whether a proposal offered in the City of Madison to establish an independent monitor and a civilian oversight board would create a conflict with the powers and duties held by the city's police and fire commission (PFC).

Relevant to your request, police and fire commissions are charged with statutory duties relating to hiring, promoting, and disciplining chiefs of police and law enforcement officers.¹ An independent monitor and a civilian oversight board may be tasked with reviewing incidents, policies, or individual performances, and making recommendations or issuing reports based on their reviews. So long as the recommendations or reports do not have the effect of hiring, promoting, or imposing discipline on a chief or a subordinate within the police department, these tasks would not interfere with the statutory duties of the police and fire commission.

POLICE AND FIRE COMMISSION IN THE CITY OF MADISON

Under state law, the City of Madison is required to establish a police and fire commission.² Five citizen members are appointed by the mayor to staggered terms and are tasked with duties relating to hiring, promoting, and imposing discipline on members of the city's police and fire departments. Specifically, the statutory duties of the PFC include:

- Appointing the chief of police and the chief of the fire department.
- Approving the appointment and promotion, by the chief, of subordinates within each department.
- Approving competitive examinations and other criteria used to evaluate applicants for appointment to, and promotion within, a department.

¹ This memorandum addresses the duties and responsibilities of the PFC as they relate to the chief of police and subordinates within a police department; the City of Madison's PFC also discharges duties and responsibilities related to the chief of the fire department and subordinates within the fire department, but they are not relevant to your inquiry.

² See s. 62.13, Stats., generally. Cities with a population over 4,000 are generally required to establish a PFC. [s. 62.13, Stats.] There are exceptions for cities that contract with another city or with a village, town, or county for police protective services [s. 62.13 (2g) and (2s), Stats.], or create joint police departments [s. 62.13 (2m), Stats.], and separate requirements for first class cities [s.62.50, Stats.].

- Approving promotions, by the chief, of subordinates within each department.
- Hearing charges filed against a chief or a subordinate and imposing certain disciplinary actions, including suspension, reduction in rank, and firing.

In order to determine eligibility for hiring a chief and hiring and promoting subordinates,³ the PFC must adopt rules for evaluation of candidates that are “calculated to secure the best service in the departments. These rules shall provide for examination of physical and educational qualifications and experience, and may provide such competitive examinations as the board shall determine, and for the classification of positions with special examination for each class.”⁴ Candidates who meet the criteria established by the PFC for hiring or promotion are placed on an eligibility list. The chief of police must choose which person to hire or promote from the list, subject to approval by the PFC.⁵

In addition to hiring and promotion, the PFC has significant duties relating to discipline of a police chief or subordinates⁶ within the police department. Under statute,⁷ the PFC has the exclusive authority in the City of Madison to suspend or terminate a police chief and to suspend, reduce in rank, or terminate a subordinate as a disciplinary action.⁸ Employees or agents of a police department who are not commissioned officers, such as certain administrative or support staff, are not subject to discipline by the PFC.

A disciplinary proceeding before the PFC is initiated when a police chief, a PFC commission member, the PFC as a body, or any other aggrieved person, files a charge of misconduct against the chief⁹ or subordinate with the president of the PFC. The term “aggrieved person” is not defined in statute, but the League of Wisconsin Municipalities construes the term broadly to include “any aggrieved individual, partnership, association, or body politic or corporate.”¹⁰

A chief or subordinate who has been charged with misconduct may be suspended, with pay, pending disposition of the charges.¹¹ A chief or subordinate has the right to an evidentiary hearing before the PFC to determine whether there is just cause, under criteria established by statute, to suspend, demote, or terminate his or her employment with the police department.¹² Courts have held that this confers

³ The City of Madison defines subordinates, for the purpose of appointment and promotion, to include the following positions: police officer, investigator, detective, sergeant, lieutenant, captain, assistant chief, inspector, and deputy chief. Rules of the Board of Police and Fire Commissioners of the City of Madison, Rule 3 a i.

⁴ Section 62.13 (4) (c), Stats.

⁵ A PFC does not typically require the chief to resubmit his or her choice for additional approval, Handbook for Wisconsin Police and Fire Commissioners, the League of Wisconsin Municipalities, p. 28 (2019), but the City of Madison requires its PFC to “promptly consider and act upon appointments from the Eligibility List proposed by the Chief.” Rules of the Board of Police and Fire Commissioners of the City of Madison, Rule 4 e iii.

⁶ For the purpose of disciplinary actions, the City of Madison defines subordinates to include any commissioned member of the police department other than the chief. Rules of the Board of Police and Fire Commissioners of the City of Madison, Rule 6 a.

⁷ Section 62.13 (5), Stats.

⁸ A termination that is not for disciplinary purposes, such as a termination for an inability, due to a health condition, to perform essential job functions, is not a disciplinary action and is not within the PFC purview. Kraus v. City of Waukesha Police & Fire Commission, 2003 WI 51.

⁹ A chief may also be suspended pending disposition of charges filed by the PFC or by the mayor. [s. 62.15 (5) (j), Stats.]

¹⁰ Handbook for Wisconsin Police and Fire Commissioners, the League of Wisconsin Municipalities, p. 34 (2019).

¹¹ Section 62.13 (5) (a), (b), (h), and (j), Stats.

¹² Section 62.15 (5) (em), Stats.

procedural due process rights, including the rights to: (1) reasonable notice of the charges; (2) legal representation; (3) confront witnesses and compel the attendance of witnesses; and (4) present evidence.¹³ A chief or subordinate may waive his or her rights to a hearing and determination before the PFC and accept an agreed-upon disciplinary action.

In order to impose discipline of a suspension, reduction in rank, or termination of employment, the PFC must find, after its evidentiary hearing and review of documents, that there is just cause to sustain the charges against the chief or subordinate.¹⁴ Under statute, the PFC must consider, to the extent possible, all of the following to determine whether just cause exists to suspend, demote, or terminate a subordinate:¹⁵

- Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
- Whether the rule or order that the subordinate allegedly violated is reasonable.
- Whether the chief, before filing the charge against the subordinate, made a reasonable effort, in a fair and objective manner, to discover whether the subordinate did in fact violate a rule or order.
- Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
- Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
- Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

These considerations may be difficult to apply if the PFC is determining whether there is just cause to sustain a charge against a chief or hearing charges brought against a subordinate by a person other than a chief. In those cases, the League of Wisconsin Municipalities urges the PFC to "attempt to determine, based upon the evidence, whether the charges were brought based upon an improper motive, whether the administration of the department rules have been fairly applied in similar circumstances, and whether the requested discipline is reasonable in light of past department discipline and the nature of the offense."¹⁶

A chief or subordinate who has been disciplined by the PFC may appeal that action to the circuit court. A circuit court that receives an appeal under s. 62.13 (5) (i), Stats., must determine whether: "Upon the evidence is there just cause ... to sustain the charges against the accused[.]" The court conducts a *de novo* review of the evidence submitted at the PFC hearing, and if it concludes there was just cause to sustain the charges, a decision to uphold the PFC's determination is final and may not be appealed.

If a chief or subordinate seeks court review of a different question, such as whether the PFC exceeded its jurisdiction or acted in a capricious manner, or whether the rules allegedly violated were unreasonably

¹³ *Conway v. Board of Police & Fire Commissioners of City of Madison*, 2003 WI 53, *State ex re. Cortez v. Board of Fire & Police Commissioners*, 49 Wis. 2d 130 (1970).

¹⁴ Section 62.13 (5) (em), Stats.

¹⁵ *Id.*

¹⁶ Handbook for Wisconsin Police and Fire Commissioners, the League of Wisconsin Municipalities, pp. 38-29 (2019).

vague or broad, he or she may also bring an action for certiorari review.¹⁷ A circuit court's decision on an action for certiorari may be appealed.¹⁸

PROPOSED INDEPENDENT MONITOR AND OVERSIGHT BOARD

The City of Madison has submitted a proposal creating a citizen oversight board (Board) and an independent monitor, each with distinct duties and authority. The details of a proposal for an independent monitor and a Board have not been finalized, and this memorandum is not intended as a review or evaluation of any proposal in its entirety, but is intended to provide an analysis of whether, and how, an independent monitor and a Board can perform its duties and exercise its authority without encroaching on the duties and authority of the PFC. Specific concerns have been raised about some aspects of the City of Madison's proposal; this memorandum will address those specific concerns.

In general, a Board, an independent monitor, or another body or entity may be given authority by a city to review, investigate, report, and take actions on any aspect of the operations of the police department, the chief, and subordinates or other employees, so long as the actions do not encroach on the PFC's statutory duties relating to the hiring, promotion, and discipline of the chief and subordinates within the department. Any proposal adopted by a city relating to the powers and duties of a Board, independent monitor, or other body or entity should be carefully drafted to ensure that, in matters relating to the hiring, promotion, and discipline of the chief and subordinates within a police department, the powers and duties are merely advisory or, in the case of disciplinary actions, allow for referral to the PFC but do not intrude into the powers exercised by the PFC.

ANALYSIS

Specific to the City of Madison's proposal, concerns have been raised regarding four of the duties assigned by the proposal to the Board. First, concern has been raised regarding a provision that directs the Board to:

“[w]ith input from the Independent Monitor, conduct an annual review of the Chief of Police to assess her or his performance in office, and submit a report to the designated City Officials responsible for completing the annual performance review of the Chief as recommended by the Ad Hoc Committee, including recommendations as to whether the Chief has satisfactorily performed his or her duties or whether the Chief has failed to perform satisfactorily, thereby constituting ‘cause’ for referral to the PFC with a recommendation for dismissal.”

The authority to conduct a review, assess a chief's performance, and submit a report with recommendations as to whether the chief's performance was satisfactory does not relate to the hiring, promotion, or imposition of discipline on the chief and, therefore, does not appear to impinge on the duties of the PFC. While the challenged language indicates that the Board may determine whether there is “cause” for referral to the PFC, with a recommendation for dismissal if the Board determines that the chief failed to perform satisfactorily, the proposal does not authorize the Board to go beyond making its

¹⁷ *State ex. rel. Enk v. Mentkowski*, 76 Wis. 2d 565 (1977); *Gentilli v. Board of Police and Fire Commissioners*, 2004 WI 60.

¹⁸ *Gentilli*, 204 WI 60.

own assessment of the chief's performance and potentially referring the chief to the PFC for a disciplinary action.

As noted earlier, any aggrieved person may file charges with the PFC and initiate a disciplinary action. Although the proposed language does not indicate that the Board would file charges with the PFC or otherwise specify what a "referral to the PFC" would entail, neither does it suggest that the Board itself would be determining whether there is just cause to impose disciplinary sanction on the chief. If "referral" means "filing a charge" with the PFC, the PFC would be required to exercise its duties relating to determining whether there is just cause to suspend, demote, or terminate a chief or a subordinate.

Second, concern has been raised about a provision in the proposal that directs the Board to "[m]ake policy-level recommendations regarding discipline, use of force, and other policies; rules; hiring; training; community relations, and the complaint process." This proposal mentions three areas of potential conflict with the authority that is reserved for the PFC: hiring; the complaint process; and discipline.

However, the proposal authorizes the Board to assess and to make recommendations relating to those topics; it does not authorize the Board or any other entity to enact policies or rules for hiring a chief or subordinate within a police department, for evaluating complaints against a chief or a subordinate, or for imposing discipline against a chief or a subordinate. This provision of the proposal does not appear to affect the PFC's sole authority to create lists of eligibility for hire or promotion of a chief or a subordinate and to approve the hiring and promotion of a chief or a subordinate. Likewise, the proposal does not appear to affect the PFC's sole authority to determine whether, once a charge is filed against a chief or subordinate, there is just cause to impose discipline on the chief or subordinate.

It should be noted, however, that the PFC's authority in hiring, promotion, and disciplinary actions is limited to the chief of police and subordinates. A proposal that authorizes the Board or another body or entity to establish policies or make decisions regarding hiring, promoting, or disciplining other employees or agents of a police department would not infringe on the authority of the PFC.

Third, similar concern has been raised over the proposal that requires the Board to:

"[f]urnish an annual public report to the Mayor and Common Council regarding the board's assessment of the work of the monitor's office; the board's activities during the preceding year; concerns expressed by community members; the board's assessment of the police investigative and disciplinary processes; recommendations for ways that the police department can improve its relationships with the community; and recommendations for changes to police department policies, rules, hiring, training, and the complaint process."

This proposal implicates the same three categories of authority vested in the PFC as discussed above: hiring; the complaint process; and discipline. To the extent this proposal affects the hiring, promotion, or discipline of a police chief or subordinate, the proposal authorizes the Board only to make an assessment and offer recommendations. The proposal does not appear to affect the PFC's sole authority to create lists of eligibility for hire or promotion of a chief or a subordinate and to approve the hiring and promotion of a chief or a subordinate. Likewise, the proposal does not appear to affect the PFC's sole authority to determine whether, once a charge is filed against a chief or subordinate, there is just cause to impose discipline on the chief or subordinate.

Finally, concern has been raised over the proposal that allows the Board to receive regular reports from the independent monitor's office and to review personnel files so that the Board may "determine

whether the Monitor's Office is effectively performing its duties and to make recommendations to the Chief of Police and Monitor's Office regarding investigations, determinations as to whether department rules or policies have been violated, and the appropriateness of disciplinary sanctions, if any[.]”

The concern relating to this provision appears to interpret the proposal to direct the Board to make its own determinations as to whether department rules or policies have been violated. As discussed below, it is my opinion that this is an incorrect interpretation of the proposal. If the provision directs the Board to make determinations as to whether a rule or policy was violated, it could create the appearance of a conflict with the PFC's sole authority to make that determination for the chief of police and subordinates. However, because the PFC is the only body with authority to make a **finding** of just cause and impose discipline on a chief or subordinate, any conflict with a determination made by the Board would have no practical effect. The proposal does not permit the Board to impose discipline, only to make recommendations regarding the appropriateness of disciplinary sanctions.

Moreover, the proposal does not appear, in my opinion, to ask the Board to determine whether department rules or policies have been violated. Instead, it directs the board to “make recommendations ... regarding determinations as to whether department rules or policies have been violated.” As discussed above, reviewing determinations as to whether rules or policies have been violated, reviewing the imposition of discipline, and making recommendations based upon those reviews does not interfere with, or intrude upon, the PFC's sole authority as it relates to disciplinary actions involving a chief of police or a subordinate.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

PJH:ksm