



WISCONSIN LEGISLATIVE COUNCIL

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TO: REPRESENTATIVE CHRIS TAYLOR

FROM:  David Moore, Senior Staff Attorney

RE: Authority of Common Council to Make Changes to the City Police Department's Use-of-Force Policy

DATE: October 26, 2016

You asked whether a city's common council has the authority to make specific changes to the city police department's use-of-force policies. The answer to your question may differ for first class cities¹ and cities that have granted their board of police and fire commissioners (PFC) optional powers under s. 62.13 (6), Stats. But you have asked specifically about second, third, and fourth class cities that do not have a PFC with optional powers, so the analysis in the memorandum focuses exclusively on these types of cities.

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. But because Wisconsin law also grants operational command of the police department to the police chief under the direction of the mayor, whether the chief could be compelled to incorporate these changes would likely be a fact-specific inquiry and depend on the nature of the specific changes sought.

BACKGROUND

City police officers are empowered to make arrests and enforce city ordinances and state laws. [s. 62.09 (13).] To carry out these duties, a law enforcement officer may use non-deadly or deadly force under certain circumstances, but the force used must be "objectively reasonable"

¹ Currently, the only first class city in Wisconsin is the City of Milwaukee.

in light of the facts and circumstances confronting [the officer].” [*Graham v. Connor*, 490 U.S. 386, 397 (1989).] The standard that Wisconsin courts have followed for determining whether an officer’s use-of-force comports with constitutional requirements is the “objective reasonableness standard” articulated in *Graham*. The Wisconsin statutes also require law enforcement agencies to develop policies to guide officers in determining whether and to what extent force is appropriate. At a minimum, these standards must be at least as stringent as *Graham*’s objective reasonableness standard.

ANALYSIS

The statutory directive to develop use-of-force standards requires “each person in charge of a law enforcement agency [to] 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.” [s. 66.0511 (2), Stats.] The obligation to prepare a use-of-force policy, then, rests with the “person in charge of a law enforcement agency.” Wisconsin law grants command of a city’s police department to the police chief under the direction of the mayor. [s. 62.09 (13), Stats.]

But authority over the police department is not limited to the police chief under the direction of the mayor. The police chief, PFC, mayor, and common council all possess authority over various aspects of the police department. Very generally, the police chief has control over the day-to-day operation of the police department, the PFC has jurisdiction over the hiring and firing of police officers and reviews the chief’s disciplinary discharge and promotional actions, and the mayor, as the city’s chief executive officer, is responsible for “tak[ing] care that city ordinances and state laws are observed and enforced and that all city officers and employees discharge their duties.” [s. 62.09 (8) (a), Stats.] In cities that do not have a PFC with optional powers, the mayor is the head of the police and fire departments. [s. 62.09 (8) (d), Stats.]

The common council’s authority to make policy for the police department is not clearly defined by the statutes, but the statutes do explicitly empower the common council to issue the police chief orders, which it may expect the police chief to follow. Section 62.09 (13), Stats., requires the police chief to “obey all lawful written orders of the mayor or common council.”

Additionally, s. 62.11 (5), Stats., provides that the common council, as the city’s policy-making body, has broad authority to control the affairs of the city, including the power to act for the health, safety, and welfare of the public:

Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means.

This authority to make policy for the city would seem to extend to having some control over determining the manner in which the police department carries out its responsibilities. When and to what extent law enforcement officers use force would appear to be related to the "health, safety, and welfare of the public," which the common council is empowered to protect.

This authority is not unlimited, though. By statute, the chief of police has "command of the city's police department," and the common council cannot effectively usurp the chief of police's ability to carry out this function. A police chief's ability to command the police department likely includes the authority to use his or her professional expertise and judgment to set policies that enable the department's officers to police and protect the community in a way that does not unreasonably expose the officers to harm.

Accordingly, a common council's authority to issue orders to the police chief under s. 62.09 (13), Stats., and to act on behalf of the city's health, safety, and welfare under s. 62.11 (5), Stats., likely authorizes the common council to provide some direction to the city's police department on the police department's use-of-force policy. But because this issue involves an area of overlapping authority, whether the police chief could be compelled to make changes based on this direction would likely depend on the specific changes sought and would require balancing the common council's authority to make city policy against the police chief's authority to carry out his or her responsibility to command the police department.²

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

DM:jal

² For simplicity's sake, this conclusion omits discussion of any role the mayor might play in a common council's decision to provide direction to its police department on the department's use of force policy. As noted above, the chief of police commands the police department "under the direction of the mayor." However, the mayor is also a member of the common council. Although the mayor may only vote on matters before the common council to break a tie, the mayor does have broad authority to veto all acts of the council except where the veto power has been expressly or by necessary implication otherwise withdrawn. A two-thirds vote of the common council is required to override the mayor's vote. [s. 62.08 (c), Stats.] Accordingly, a common council could not direct the city's police department to make changes to its use of force policy if the mayor successfully vetoed the ordinance or resolution in which this direction was contained.