
Wisconsin Legislative Council



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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