

CITY OF MADISON  
**OFFICE OF THE CITY ATTORNEY**  
Room 401, CCB  
266-4511

DATE: October 17, 2005

**MEMORANDUM**

TO: **Mayor Dave Cieslewicz**  
**Priscilla Mather, Chair, Board of Water Commissioners**  
**Janet Piraino, Mayor's Chief of Staff**

FROM: Michael P. May, City Attorney

SUBJECT: **Conflicts Between Sec. 66.0805, Wis. Stats., Chapter 13, MGO, and Employment Contract with Water Utility Manager**

Over the last year, it has come to my attention that several practices that the City engages in with respect to utility operations are not strictly in compliance with state law. This has come up in several contexts.

This memorandum is prompted in part by the renewal of the Employment Agreement for the Water Utility Manager, David Denig-Chakroff. The memorandum examines the areas of conflict and potential remedies for the conflict.

**Sec. 66.0805, Wis. Stats.**

This is the statute that governs the operation of utility commissions. The statute is clearly designed to give a certain level of independence to utility commissions, to separate them from the political influences of the common council (note that the purpose is to provide for "non-partisan management" of utilities). Several sections of the statute will be set out below.

Of primary importance is that the utilization of a utility commission is optional with the City. The Common Council is, ultimately, the 800 lb. gorilla which can abolish a utility commission and transfer the control of the utility to a committee of the Common Council, the Board of Public Works, or some other specially established board or commission. Thus, although utility commissions do enjoy certain levels of independence, to the extent they exceed the bounds of what the Council finds to be reasonable, they may find themselves out of a job.

Nonetheless, the Wisconsin Supreme Court made clear in the case of *Schroeder v. City of Clintonville*, 90 Wis. 2d 457, 280 N.W.2d 166 (1979), that once a municipality opts to utilize the a commission under the procedure set out in 66.0805, the municipality must follow those procedures and create the quasi-independent commission envisioned in the statute. The court explicitly rejected the *City of Clintonville's* claim that it had created a "hybrid" commission. 90 Wis.2d at 465. As will be noted below, it appears that this "hybrid" is exactly what Madison may have intended.

Some of the relevant provisions of the statute provide as follows:

66.0805 Management of municipal public utility by commission.

- (1) Except as provided in sub. (6), the governing body of a city shall, and the governing body of a village or town may, provide for the nonpartisan management of a municipal public utility by creating a commission under this section. The board of commissioners, under the general control and supervision of the governing body, shall be responsible for the entire management of and shall supervise the operation of the utility. The governing body shall exercise general control and supervision of the commission by enacting ordinances governing the commission's operation. . . .
- (3) The commission shall choose a president and a secretary from its membership. The commission may appoint and establish the compensation of a manager. The commission may command the services of the city, village, or town engineer and may employ and fix the compensation of subordinates as necessary. . . .
- (6) In a 2nd, 3rd or 4th class city, a village or a town, the council or board may provide for the operation of a public utility or utilities by the board of public works or by another officer or officers, in lieu of the commission provided for in this section.

In *Schroeder v. City of Clintonville*, supra, the utility commission had granted a 10% wage increase to the utility employees. The common council voted to rescind the increase and grant a 6% wage increase, the same as had been granted to other city employees. The employees sued the city after their claim was denied.

The Supreme Court ruled that the authority to set the wages for the utility employees rested in the utility commission. The Court first found that the authority given to the commission to fix the compensation of employees was a specific statute, which governed over any general authority that the common council normally had over employees' salaries, or over boards and commissions. The Supreme Court then quoted with approval from prior opinions of the Attorney General that "it was the legislature's intent that the 'operation of the municipal utility be carried on divorced from the direct supervision of the council.'" 90 Wis. 2d at 463.

Finally, the court rejected *Clintonville's* assertion that it had created some sort of hybrid or de facto form of mixed management that had stripped the commission of its statutory authority. 90 Wis. 2d at 465.

It should be noted that, among other authorities on the power of utility commissions: the Attorney General has opined that a utility commission might retain its own attorney, 23 OAG 256 (1934); the statutory change giving utility commissions "entire charge and management" was considered to have subsumed the utility commission's authority to enter into contracts on behalf of the city set forth in the prior statutes, L. 1921, C. 396; utility commissions are not separate corporations or quasi-municipal bodies, but departments of the City which are granted some independence by law, *Roberts v. City of Madison*, 250 Wis. 317, 325, 27 N.W.2d 233 (1947), 65 OAG 243 (1976).

### **Sections 13.01 to 13.02, Madison General Ordinances**

An examination of Secs. 13.01 and 13.02, MGO, shows some conflicts with the general state law set out above. Among those I note are the following:

1. Although the ordinance refers to Sec. 66.0805(2), it does not explicitly state that the commission is one created under 66.0805.
2. The ordinance does not explicitly state that members of the commission are appointed by the Common Council.
3. The language with respect to the authority of the Board and the Common Council in 13.01(2), relies on outdated language in the ordinance, and fails to accurately track the current statute.
4. Sec. 13.02(1) provides that the Utility general manager is appointed by the Board of Water Commissioners "subject to approval of the Mayor and Common Council and the position filled according to Sec. 3.38(6)(f) of these ordinances".

Particularly with respect to the last provision, the Madison General Ordinances appear to be attempting to create some in-between or "hybrid" position with respect to the Water Utility Commission's authority.

### **Contract of Current Water Utility Manager**

There are a number of provisions in the current contract which would appear to conflict with current law. These include the following:

1. The contract states that the general manager was confirmed for appointment by the Common Council. (page 1)
2. Several provisions indicate that the manager reports to the Mayor, as opposed to the Board of Water Commissioners. (See Sec. II, D., page 3; and Sec. III, B. 2., page 4; and Sec. V., page 5.)
3. Other provisions seem to suggest that the manager is solely controlled by the Board of Water Commissioners. (See Sec. IV., B. and C, page 5.)
4. Sec. II, F., of the agreement states: "The General Manager shall have no right to make

contracts or commitments for or on behalf of the City except as pre-authorized by statute, ordinance or express written consent of the City." Recognizing that state law appears to give some authority to the Commission to agree to such contracts, this provision would need to be changed.

5. The Mayor has been given the authority to discharge the general manager in Sec. V (page 5).

### **Potential Resolution of Conflicts**

I suggest that there are five potential resolutions of these discrepancies. Keep in mind that the resolution adopted here may apply to other managers who are subject to what the Council has deemed to be utility commissions.

A. Maintain Current Arrangement.

One option is to ignore these discrepancies, maintain the current arrangement which appears to generally work for the City and Commission and its managers, and simply hope that there never is a conflict which arises. I do not think this course is the wisest, simply because I believe we ought to follow state law as closely as we can, and I think it makes sense to make changes when things are going well, not when there is a crisis.

B. Substantial Adherence to State Law:

The contract and the ordinances could be modified to essentially reverse the status of the Commission and the Council and Mayor, which if not in strict adherence to state law, would at least be in substantial conformance thereto. This also might be, in a practical sense, not much different than the current situation.

Under this arrangement, the Board of Water Utility Commissioners would itself have the authority to appoint the manager. The Common Council would simply concur in that appointment. The Board of Water Utility Commissioners would appoint the Mayor as its agent for oversight and discipline of the manager, subject to their final authority, and similarly, the language with respect to adherence to Sec. 3.38(6)(f) would be clarified in the current ordinances.

This arrangement, to me, is needlessly confusing and may be a political impossibility.

C. Strict Adherence:

Strict adherence to the current statutes would essentially remove the Common Council and Mayor from either oversight of the utility manager and the determination of his compensation or his employment terms. I suspect that this strict adherence could cause significant political upheaval, and perhaps result in the elimination of the Utility Commission. I have attached an example of a strong Commission ordinance, used in Manitowoc.

D. Use Sub. (6) To Opt Out:

- E. As noted above, there is no requirement that a Madison use a utility commission at all. The City could use sub. (6) of the statute to provide for "the operation of a public utility or utilities by the board of public works or by another officer or officers, in lieu of the commission provided for in this section."

Under this scenario, the City would modify its ordinances to say it was not creating a commission under 66.0805(1), but rather was exercising its optional powers and creating a new set of officers called the "Water Board" and giving them the following powers. Then the City could in its ordinance give the Board as much or as little authority as it wished.

I think this option, although perhaps time consuming, could both bring the City in line with state law and preserve most of the existing practice as to how the City operates.

E. Charter Ordinance Change:

The City might wish to modify some of the provisions of Sec. 66.0805 as it applies to the City, through a charter ordinance, to adopt a system more to its liking. This is simply a variation of Option F. Given that Option F exists, I'm not sure why we would go the charter ordinance route.

I suggest we meet to discuss these alternatives before taking any action.

Attachments

- A. Sec. 66.0805, Wis. Stats.
- B. Sec. 13.01 to 13.02, MGO.
- C. Current Agreement of Water Utility Manager
- D. Decision in *Schroeder v. City of Clintonville*.
- E. Outline from Talks Presented by M. May to League of Municipalities on Power of Utility Commissions vs. Common Councils.
- F. A Strong Commission Ordinance as adopted by the City of Manitowoc.

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Michael P. May  
City Attorney

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Attachments

