

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

Date: March 22, 2017

**MEMORANDUM**

TO: Members of the Madison Common Council

FROM: Michael P. May, City Attorney

RE: Reimbursement of Chief Koval's Legal Fees for PFC Proceeding;  
Legistar File 46571

You have asked for my analysis of the City's obligation, if any, to reimburse Police Chief Mike Koval's legal costs in defending himself on two complaints before the Police and Fire Commission (PFC).

This requires review of several standards. The first is Wis. Stat. sec. 62.09(7)(e):

Whenever a city official in that official's official capacity is proceeded against or obliged to proceed before any court, board or commission, to defend or maintain his or her official position, or because of some act arising out of the performance of that official's official duties, and that official has prevailed in such proceeding, or the council has ordered the proceeding discontinued, the council may provide for payment to such official such sum as it sees fit, to reimburse the official for the expenses reasonably incurred for costs and attorney fees.

The first question under the statute is whether the Chief "prevailed" in the PFC proceedings. There is no Wisconsin case law interpreting the meaning of "prevailed" in this statute.

In its decision (attached), the PFC found that the Chief violated certain standards of the Madison Police Department. However, the PFC then went on to find that the violations were not of such a nature that it would impose the limited available discipline that it could impose. The PFC Decision and Order ends with the following Order:

On the entire record in these proceedings, including the foregoing the Statement of Charges in these matters are each dismissed, with prejudice.

If this is all we had, determining if the Chief prevailed would present a legal conundrum, since he was found to have violated standards, but no discipline was imposed and the complaints were dismissed. We might have been attempting to argue by analogy from cases like *Farrar v. Hobby*, 506 U.S. 103 (1992), in which the U.S. Supreme Court analyzed who was a "prevailing party" under a fee reimbursement statute associated with civil rights claims. In that case, the court made the Solomon-like ruling that a party

who obtained a finding of wrongdoing, but was awarded no damages, was a prevailing party – but was not entitled to reimbursement of fees since it was only a “technical” victory. Another source would have been to try to dredge up the 40 year old cases involving Chief David Couper, where my understanding is that something like 37 of 40 counts were found in the Chief’s favor. Chief Couper informed me had did not pay any of his legal fees, but that doesn’t tell us if the City paid them all, or on a pro-rata basis, with the Chief’s attorney reducing his fees to match the City’s payment. For reasons noted below, I did not search for a 40 year old resolution on the matter.

Luckily, this statute is not all we have, and an examination of other applicable standards shows we need not go down that more difficult road.

Last fall, the Council adopted Resolution RES-16-00697, Legistar No. 44195, entitled “A Resolution committing the City to provide the same treatment for expenses incurred by the Police and Fire Chiefs in defending complaints before the Police and Fire Commission as the City provides to other Police Officer and Firefighters.” The resolution may be found here:

[https://madison.legistar.com/ViewReport.ashx?M=R&N=Master&GID=205&ID=2820022&GUID=E1071A68-32B7-47DC-AB8C-D8FCC444FE75&Extra=WithText&Title=Legislation+Details+\(With+Text\)](https://madison.legistar.com/ViewReport.ashx?M=R&N=Master&GID=205&ID=2820022&GUID=E1071A68-32B7-47DC-AB8C-D8FCC444FE75&Extra=WithText&Title=Legislation+Details+(With+Text))

The Resolution provides in part:

WHEREAS, the City has for many years provided in agreements with police officers and firefighters that the City will pay the attorneys fees and costs of defense in actions before the PFC, provided the respondent prevailed in such action (see, for example, Art. XVII. A. 2. of the Collective Bargaining Agreement with the MPPOA); and

WHEREAS, the Common Council finds that it is necessary and appropriate to provide the same protection to the Police and Fire Chiefs of the City, as permitted under sec. 62.09(7)(e), Stats.

NOW, THEREFORE, BE IT RESOLVED, that the Common Council commits to providing the police chief and the fire chief the same protections provided to other police officers and firefighters facing complaints at the PFC, and to exercise its discretion under sec. 62.09(7)(e), Wis. Stats., to reimburse the chiefs for the reasonable costs and fees incurred, if the chief prevails in the proceedings; and

BE IT FURTHER RESOLVED, that upon conclusion of any such proceedings, an additional resolution will be presented to the Council with the chief’s request for reimbursement and proposing payment of such reasonable costs and fees, if the chief prevails in the proceedings.

The resolution makes a specific reference to the treatment afforded other police officers and firefighters pursuant to collective bargaining agreements, and a specific reference to Sec. XVII A. 2. of the MPPOA agreement. That agreement may be found here:

<http://www.cityofmadison.com/HR/documents/contracts/MPPOA-2016.pdf>

and the referenced section provides as follows:

In the event an action or special proceeding is prosecuted by a third party before the Police and Fire Commission, the City agrees to pay reasonable attorneys' fees provided the employee is found by the Police and Fire Commission to have acted within the scope of his/her employment and the employee is exonerated by the Police and Fire Commission of all charges *or the charges are otherwise dismissed* or withdrawn. (Italics added)

It is clear that, in the PFC proceeding against Chief Koval, the charges were "otherwise dismissed." In my opinion, this brings the Chief within the City's commitment to reimburse his costs and fees, just as it would for any other police officer under the language above.

The PFC decision does not explicitly state that Chief Koval was acting "within the scope of his/her employment." The description of the case shows he was within the scope of his employment. I do not think there is any question that he was, and it simply appears that none of the parties requested a finding on this point. If the Council were to deny the Chief reimbursement on this basis, I presume the Chief would petition the PFC for such a finding -- a conclusion that I think is quite obvious on the record presented. Moreover, in past cases the Council has reimbursed officers when there was no such finding by the PFC, but it was clear the officers were acting within the scope of their employment. See, e.g., the PFC decisions involving Officers Borth, Eull, Xiong, and Kobinsky, and the Council resolution approving payment of their fees (attached). If the Council is going to follow the dictates of its resolution to treat the Chief in the same manner as other officers, it should provide reimbursement here.

I interpret the inclusion of this language in the union agreements, and subsequent application to the Chiefs, as the City's determination of how it is going to apply the question of whether the officer or firefighter "prevailed" under the related statute, at least as to claims before the PFC. Since Chief Koval is entitled to the same treatment, I recommend the Council approve the resolution reimbursing his fees.

This memo and the attachments will be added to the Legistar file.

CC: Mayor Paul Soglin  
Chief Mike Koval  
Dave Schmiedicke