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

Date: April 13, 2017

MEMORANDUM

TO: Common Council Members

FROM: Michael P. May, City Attorney

RE: Reimbursement of Chief Koval's Legal Expenses, Legistar No. 46571

I. Introduction.

This memorandum supplements the one I sent dated March 22, 2017. I will not repeat the legal analysis in that memo. That memo relied upon language in the Madison Professional Police Officers Association (MPPOA) collective bargaining agreement to conclude that the City should reimburse Chief Koval's legal fees for his defense before the Police and Fire Commission (PFC). At the time, I assumed similar language was in the agreement for the Association of Madison Police Supervisors (AMPS). As it turns out, AMPS has one of the two paragraphs in the MPPOA Agreement, but for some reason does not have the other paragraph.

The MPPOA agreement provides:

> A. Attorney Fees:
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> 1. In the event an employee is proceeded against or is the defendant in an action or special proceeding in his/her official capacity, or arising out of his/her employment by the City, the City agrees to pay all reasonable attorney's fees required by the provisions of Sec. 62.115, 895.46 and/or 895.35 of the Wisconsin Statutes governing the obligations by the City to such employee, except in the event the action or special proceeding is brought by the City against the employee, and provided, however, in any event, the City Attorney shall determine whether legal counsel shall be furnished to such employee by the City Attorney or his/her designee.
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> 2. 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the employee is exonerated by the Police and Fire Commission of all charges or the charges are otherwise dismissed or withdrawn.

MPPOA Agreement, Page 46, Article XVII. This is the section explicitly referenced in the Council resolution of 2016, Resolution RES-16-00697, Legistar No. 44195 (the "Same Treatment Resolution"). The Same Treatment Resolution is important because it binds the City to do things that it might not have been required to do otherwise.

The AMPS Agreement contains the first paragraph above, but not the second paragraph[1]. The first paragraph covers "actions and proceedings" and two of the referenced statutes do not apply here. Wis. Stat. sec. 62.115 authorizes the Council to allow the City Attorney to defend a city official, but that did not occur here. Wis. Stat. sec. 895.46 only applies to proceedings in court. Wis. Stat. sec. 895.35 arguably is broad enough to apply here, and both the AMPS Agreement and the MPPOA Agreement require the City to pay ("the City agrees to pay") the costs of defense if sec. 895.35 applies. The statute allows the City to pay if "such action is discontinued or dismissed."

Since my initial opinion relied upon the language in the MPPOA Agreement and the City's Same Treatment Resolution, without considering the AMPS Agreement, I need to provide advice on how to treat that Agreement. The AMPs Agreement does raise additional considerations in applying the Same Treatment Resolution, but as I discuss below, the issues are relatively easily resolved.

The next section of this supplemental memorandum applies standard rules for interpretation of legislation to resolve any ambiguity in the Same Treatment Resolution. I conclude, as I did in my initial memo, that the MPPOA language that specifically references the PFC is the most appropriate to apply, and therefore the Chief's fees should be paid.

The third section of this memo assumes, contrary to the second section, that the Chief is subject to the Wis. Stat. sec. 895.35 language contained in both the MPPOA Agreement and the AMPS Agreement. I conclude that under that standard, the Chief's fees should be paid.

The fourth section of this memo looks at Wisconsin common law and determines that, under the analogous rule in civil cases, the Chief is the prevailing party. Thus, I conclude that under any reading of the law and the Same Treatment Resolution, the City must pay the Chief's costs of defense.

II. Applying standard legislative interpretation rules, the Chief is subject to the standard in the MPPOA contract and his fees should be paid.

The purpose of the Same Treatment Resolution is clear; it is to provide to the Chiefs the same treatment as other police officers or firefighters receive before the PFC, and to remove the Council's discretion to deny them reimbursement. In so doing, the

1 AMPS and the City are in the process of negotiating a new agreement. My understanding based on communications from City Human Resources, Labor Relations, and representatives of AMPS is that the additional MPPOA language for the PFC has been agreed upon for the new AMPS agreement.

Resolution made a specific reference to the provision of the MPPOA Agreement cited above. There is no reference to any other agreement or to any other treatment of police officers before the PFC.

One of the standard rules of construction of a legislative act is that if the act is unclear, specific language controls over general language. See, e.g., *In re the Paternity of J.S.C.,* 135 Wis. 2d 280, 294-295, 400 N.W. 2d 48 (Ct. App. 1986). Here we have very specific reference to a provision in the MPPOA Agreement, which refers to proceedings before the PFC, so this specific language would govern over any general language.

Other rules of construction provide that the words are not to be given absurd, unreasonable or implausible results, or results that would defeat the purpose or object of the legislation. *Force ex rel. Welcenbach v. American Family Mut. Ins. Co.,* 2014 WI 82 ¶30, 860 N.W. 2d 866 (2014); *Hubbard v. Messer,* 2003 WI 145 ¶9, 673 N.W. 2d 676 (2003).

With those purposes in mind, we can paraphrase the two possible readings of the Same Treatment Resolution as follows:

> First Reading: We are passing this resolution to give the chiefs the same treatment as other police officers or firefighters before the PFC in payment of legal fees, and by this we mean the treatment of fees before the PFC spelled out in this provision of the MPPOA.

Or the alternative reading:

> Second Reading: We are passing this resolution to give the chiefs the same treatment as other police officers or firefighters before the PFC in payment of legal fees, and by this we mean the more vague language in both the AMPS Agreement and the MPPOA Agreement, which says nothing specific about payment of fees before the PFC.

I submit to the Council that the second reading is an implausible reading of the Same Treatment Resolution, and could defeat the purpose of the Resolution[2].

There is one other fact the Council should consider. I checked with the MPD and was told that 92% of the force is covered by the MPPOA standard. That is, 92% are under the MPPOA Agreement and 8% are under the AMPS Agreement. The Chief, of course, is covered by neither. But if one were simply looking at the odds as to which agreement would cover the Chief, those odds would be 23-2 in favor of the MPPOA Agreement.

For all of these reasons, I conclude that the most reasonable reading of the Same Treatment Resolution is to afford the Chief the treatment set out in the MPPOA Agreement for proceedings before the PFC, under which the City agrees to pay the fees if the charges are "otherwise dismissed," as occurred in this hearing.

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2 As noted in the analysis below, even this less plausible reading requires the City to reimburse the Chief.

III. Even if the Council Applies the Less Specific Standard in both the AMPS and MPPOA Agreements, the City is required to pay the Chief's legal fees.

In my first memorandum, I sidestepped the question of whether the Chief "prevailed," a question which I termed a "legal conundrum" because of the nature of the PFC ruling. While I speculated as to what I might examine if I tried to answer that question, I determined that the MPPOA standard answered it for us. As set forth above, I continue to believe that is the best reading of the Same Treatment Resolution.

But the Council might view it differently. Perhaps the Council thinks the Chief should be treated more like the Police Supervisors than the rank and file officers, in which case we apply Wis. Stat. sec. 895.35 and the language contained in both the AMPS and MPPOA Agreements, where the City has removed any discretion and "the City agrees to pay" the costs of defense if the statute applies.

Looking first to Wis. Stat. sec. 895.35, the only statute in the language in both the AMPS and MPPOA Agreements that might apply, it is quite clear that the Chief's fees must be paid. This statute provides in part:

> Whenever in any city … charges of any kind are filed or an action is brought against any officer thereof in the officer's official capacity … and such charges or such action is discontinued or dismissed … such city … may pay all reasonable expenses which such officer necessarily expended by reason thereof.

The statute would apply here since the charges against Chief Koval were dismissed. While the statute makes payment discretionary ("such city … may pay"), the language in the AMPS agreement removes the City's discretion ("the City agrees to pay"). The commitment in that Agreement is applicable to the Chief by the Same Treatment Resolution. So, under this provision, the City must reimburse Chief Koval's defense costs[3].

Because of the City's commitment in the Same Treatment Resolution and the language in the AMPS and MPPOA Agreements, the City has agreed to pay the Chief's costs. This is not a case where the City is only applying the statutes, which contain discretion to pay or not.

IV. Applying Wisconsin Common Law, the Chief prevailed in the PFC proceeding and the City should reimburse his fees.

If we turn our attention to the general question of whether the Chief prevailed in the PFC proceeding, we would face the "legal conundrum" posed in my initial memorandum. Upon further review and research, the cases mentioned in my initial memo are not applicable to this situation. The federal case involved a plaintiff who obtained a judgment for nominal damages. In the case of Chief Couper, the PFC

3 My first memo discusses the two complaints against the Chief that went to hearing. There was a third complaint that was dismissed months ago, so those costs fall within the rule set out in this memo.

issued a letter of reprimand to the Chief, what I would consider the PFC equivalent of a nominal damage award.[4]

But in the Koval case, the PFC dismissed all of the charges, with prejudice. While we cannot read the minds of the Commissioners, it is clear that whatever mistakes they concluded the Chief made, those mistakes did not rise to the level that would justify ***any*** action by them. They did not provide ***any*** of the remedies that might be analogous to a nominal damage award: they did not issue so much as a one day suspension, or a half-day suspension, or a two-hour suspension with pay, or even a letter of reprimand. They dismissed all the charges.

So the analogous situation in a civil case would be a case where the plaintiff proved some kind of breach of duty, but was awarded no damages at all, not even nominal damages. I found several Wisconsin cases with this fact situation, and in each one the defendant was found to have prevailed, and judgment was granted to the defendant dismissing the claims.

In *Mattox v. American Family Mutual Ins. Co,* 115 Wis. 2d 699, 341 N.W. 2d 418 (Ct. App. 1983, Appeal No. 82-2309, Unpublished Decision), the jury found that a driver was causally negligent in hitting the plaintiff, but awarded zero damages. Judgment was entered for the defendant dismissing the claims, and was affirmed by the Court of Appeals. In *Jordan v. Wille,* 2017 WL 548978, Appeal No. 2015AP2636 (Ct. App. 2017, Unpublished Decision), the jury found that the defendant had engaged in misrepresentation, but found zero damages. Judgment was entered for the defendant dismissing the claims, and was affirmed by the Court of Appeals.

Similarly, in a contract case that had a contractual requirement that the prevailing party's legal fees would be paid by the other party, the Wisconsin Court of Appeals ruled that a party that obtained a ruling that the contract was breached, but was awarded no damages, was not the prevailing party entitled to an award of fees. *Advanced Green Energy Solutions v. Pieper Electric Inc.,* 2014 WI APP 24 ¶25, 843 N.W. 2d 755 (Ct. App. 2014, Unpublished Decision).

Thus, whatever the rule in other states, the rule in Wisconsin is that a person bringing a claim must obtain a judgment for damages or obtain some other relief to be a prevailing party; that is, when all that a party obtains is a ruling that the defendant breached a duty, but no damages were awarded, the defendant is the prevailing party[5].

Perhaps the most instructive case is the old Wisconsin Supreme Court ruling in *Hartwig v. Eliason*, 164 Wis. 331, 159 N.W. 943 (1916). This is an unusual case, described by the Court this way (at 331):

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4 I rely on Mr. Gelembiuk's description of the Couper case in his email of March 19, 2017. I have not independently verified his assertions.

5 In his email of March 19, 2017, Mr. Gelumbiuk quotes extensively from a Colorado decision that apparently adopts a contrary rule. As noted, this is not the law in Wisconsin, and other jurisdictions also have rejected the Colorado ruling. See, e.g., *Lewis v. Grange Mutual Casualty Co.,* 11 S.W. 2d 591, 594 (Ky. Ct. App., 2000). See also, footnote 6, below.

> Plaintiff sued defendant for slander, and defendant … counterclaimed for libel. The action was tried and the jury by special verdict found both the slander and the libel, and assessed the damages of each party at six cents. The court offset the damages, rendered judgment for the defendant for full costs and plaintiff appeals.

The question before the Court was whether defendant or plaintiff was entitled to costs. The right to costs is statutory, and the Court had to interpret the predecessors to current Wis. Stat. secs. 814.01 and 814.03, which provide in relevant part:

> **814.01 Costs allowed to plaintiff. (1)** Except as otherwise provided in this chapter, costs shall be allowed of course to the plaintiff upon a recovery.
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> **(3)** In an action for assault and battery, false imprisonment, libel, slander, malicious prosecution, invasion of privacy or seduction, a plaintiff who recovers less than $50 damages shall recover no more costs than damages.
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> **814.03 Costs to defendant. (1)** If the plaintiff is not entitled to costs under s. 814.01 (1) or (3), the defendant shall be allowed costs to be computed on the basis of the demands of the complaint.

The statutes at the time of the *Hartwig* case were similar. The Court ruled as follows (at 332):

> It follows from these provisions that if the plaintiff here "recovered" six cents damages he is entitled to six cents costs, and the present judgment is wrong; but if the plaintiff recovered nothing, the defendant is entitled to full costs, and the judgment is right. It all depends on the meaning of the word "recovery" in section 2918. However the word may be construed in other connections, it appears certain from the provisions of sections 2859 and 2861, Statutes, that it means judgment in the cost statute, and not verdict. These sections make it clear that in actions for money damages where a counterclaim is interposed there are never two recoveries, but only one, namely, the difference between the sums allowed by the jury or the court to the respective parties. Here the amounts allowed by the jury were equal, and the court properly offset them and rendered judgment for costs to the defendant because there was no recovery by the plaintiff.

The lesson of *Hartwig* is clear: What happens up to the final determination or judgment or order in a case is not what determines who has a recovery or who has prevailed; that question is determined by what happens in the final determination. As applied by analogy to the Koval case, what matters is what the PFC did at the end, where it dismissed all the charges, meaning that the Chief has prevailed.

The old *Hartwig* case was recently interpreted by the Wisconsin Court of Appeals in *Estate of Radley ex rel. Radley v. Ives*, 2011 WI APP 144, 807 N.W. 2d 633 (2011). The Court of Appeals confirmed this reading of *Hartwig* (at ¶13):

> Although the plaintiff had been awarded damages of six cents on the verdict, and therefore arguably made a "recovery," the *Hartwig* court concluded "recovery" within the statute meant on the judgment, and the plaintiff had not recovered on the judgment because the judgment awarded the plaintiff nothing due to the off-setting awards.
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> Thus, under *Hartwig,* courts assessing a request for costs under Wis. Stat. §§ 814.01(1) or 814.03(1) look to whether the plaintiff has made a recovery under a judgment, not to whether he or she obtained a favorable verdict at trial.

Again, as applied to the Koval proceeding, while the complainants might be considered to have a favorable "verdict" as to some but not all of the claims, they did not obtain a favorable "judgment," which is what is required to show a recovery. Under this analysis, Chief Koval prevailed in the proceeding.

Under the applicable statutes and the most analogous Wisconsin cases, I conclude that Chief Koval prevailed in the proceeding and the City should reimburse his costs[6].

V. Conclusion.

Council members may not agree with the decision of the PFC. You may not condone the actions of the Chief. You may even want to punish the Chief by denying reimbursement of his legal fees. None of those considerations are relevant. The only question is whether under the City's commitment in the Same Treatment Resolution and the applicable law, the City is required to reimburse the Chief's defense costs.

My further research has confirmed my initial conclusion. Under the decision of the PFC, Chief Koval prevailed, and under the City's Same Treatment Resolution, the City should reimburse the Chief for all of his defense costs.

CC: Mayor Paul Soglin
Chief Mike Koval
ACA Marci Paulsen

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6 Although not as relevant as the Wisconsin cases because it was applying federal law, the following statement of the law by Judge Richard Posner of the U.S. Seventh Circuit Court of Appeals in Chicago is instructive:

> The general, indeed all but invariable, rule is that to be a prevailing party and therefore entitled to an award of fees and costs, you either must obtain a judgment that provides you with formal relief, such as damages, an injunction, or a declaration that you can use if necessary to obtain an injunction or damages later, or must obtain a settlement that gives you similar relief.

Dechert v. Cadle Company, 441 F. 3d 474, 475 (7th Cir. 2006). Under this standard, Chief Koval was the prevailing party as he obtained an order giving him formal and final relief, dismissing the charges.