

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

Date: April 28, 2017

MEMORANDUM

TO: Members of the Common Council

FROM: Michael P. May, City Attorney

RE: Second Supplemental Memo on Reimbursement of Chief Koval's Legal Fees; Legistar No. 46571

I. Introduction.

I reviewed my prior memos, the cases and statutes. I confirm the legal analysis that I presented in my two prior memos. Under those laws, the ultimate dismissal of the charges means that Chief Koval prevailed in the proceedings. Under the Council's Same Treatment Resolution of last year, you determined that the City "commits ... 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...." I recommend that the City provide full reimbursement because that is what a court would order the City to do.

II. The Murray Case

Several persons have suggested your consideration is subject to the case of *Murray v. City of Milwaukee*, 2002, WI APP 62, 252 Wis. 2d 613 (2002). It is not.

In *Murray*, Milwaukee did not pass a Same Treatment Resolution like Madison did last year, determining how it would treat requests for reimbursement. As I stated in prior memos and to the Council at its last meeting, I would be providing an entirely different legal analysis if there were no Same Treatment Resolution. In effect, those asking you to rely on the *Murray* case are telling you that the Same Treatment Resolution – one you agreed to unanimously -- means nothing.

In *Murray*, the attorney alleged that Milwaukee had a "policy and practice" of paying for fees for PFC defense. That policy or practice was apparently never even reduced to writing; at least it is nowhere to be found in the decision, and it appears it was simply an allegation by the lawyer. Because the case was decided on a motion to dismiss, the legal rule is that the court must assume the allegation was true. But a policy or practice, apparently never written down, is nothing like a formal legislative enactment of the Common Council – a local law -- setting forth exactly what the Council is committing to do. So the *Murray* case is not relevant to the current situation.¹

¹ In addition to not being legally applicable, the facts in *Murray* are very different: the police officers in *Murray* pled guilty to numerous violations and served a 60 day suspension, upheld by the Milwaukee PFC.

III. Even if You Ignore Your City Attorney's Advice, the City Must Reimburse the Chief at least \$19,611.

Despite my legal opinion and all the case law that shows that the Chief prevailed, I wish to point out how much money is really at stake in the reimbursement question. As shown below, even if the Council wants to ignore my advice and not reimburse the Chief for all of his fees and expenses, the City still is responsible for at least \$19,611.16 in reimbursements to the Chief. Under any view of the PFC ruling, the Chief prevailed on matters entitling him to that amount. A more correct calculation under this incorrect view of the law would be to reimburse a total amount of \$20,782.57.

The theory that the Chief did not prevail at the PFC is that, even though all charges were dismissed, the PFC found he violated some MPD standards. If we review the PFC ruling, it is clear that on the vast majority of the charges, the PFC did not find any violation of standards. Thus, on any matter where there was no violation of standards, the City still owes the Chief reimbursement.

Of the total bill, at least \$2,040 of the charges are for dismissal of the Stillman complaint (from the total bill, see entries on 9/09, 9/14, 9/25, 9/28/, 10/04 and 10/05). The City must reimburse for those charges since the Chief prevailed in getting a dismissal and there was no finding of a violation of standards.

Amount owed the Chief on the Stillman matter = \$2,040

That leaves a balance of \$19,913.98. There were three sets of actions of the Chief that were alleged to be violations of the standards of conduct: the actions in the Council chambers, the statements in the stairwell, and the reaching for the gun. The PFC dismissed two of the three outright, without finding any violations of standards, and only found the statements in the stairwell to violate MPD standards. Thus, the City is responsible for the Chief's costs in getting two of the three matters dismissed. That means only 1/3 of the balance is possible to dispute.

Amount owed the Chief on the 2/3 matters dismissed = \$13,275.99

Subtotal owed the Chief = \$15,315.99

That leaves a balance of \$6,637.99. However, even on the one charge remaining, it is clear that the PFC did not find that the Chief violated all the standards alleged to be violated. The PFC only mentions 6 standards in its decision. I went through the complaints and created a chart (attached) of the standards where the Chief prevailed and where he did not. It shows that of the total of 51 counts of alleged violations, the Chief prevailed on 33 of them. So the amount possibly in dispute is further reduced to 18/51 of the balance.

Amount owed the Chief on the 33/51 counts dismissed = \$ 4,295.17

Subtotal of the minimum amount owed the Chief = 19,611.16

This means that the minimum amount the City owes the Chief, even under the erroneous legal theory being put forth by others, is at least \$19,611.16.

As I noted above, my recommendation remains to pay the entire costs of defense due to the dismissal of the charges. But if the Council is trying to apply this “alternative” legal theory to determine who prevailed, the fact that the charges were dismissed -- even if a violation is found -- must count as a partial victory. The amount of reduction in the reimbursement should be reduced by an additional 50% to account for what may be considered a “half-and-half” ruling of the PFC. Thus, I believe that the Council needs to reimburse the Chief an additional \$1,171.41.

This would bring the total reimbursement to **\$20,782.57**.

IV. What If?

Several Council members have asked me “What happens if we fail to approve the reimbursement?”

All of my legal analysis is to determine what a court would decide if the issue were presented to it. Assuming the Chief brings a lawsuit against the City, whether or not preceded by a claim filed pursuant to sec. 62.12(8), Wis. Stats., my analysis shows that a court will rule against the City. The City will have a judgment entered against it for the full amount of the fees, and the costs of the legal proceeding. Depending on how the court interprets the City’s position, the City may be responsible for the Chief’s additional legal fees in the court proceeding.

If a court action were filed, the Council would need to determine if the City wished to dispute the claim. If it wished to dispute the claim, the City would need to retain special outside counsel to represent it. Under various sections of the *Rules of Professional Conduct for Attorneys* (see, e.g., SCR 20:1.7, SCR 20:3.7), the City Attorney would either have a conflict of interest not subject to waiver, or I would be a witness in the case, or both, due to my legal analysis presented to you. If the City refused to retain outside counsel, or if no outside counsel agreed to take the case, I would be bound by those and other rules of professional conduct to simply admit the claim was valid, and a judgment would be entered against the City.

CC: Mayor Paul Soglin
Chief Michael Koval
ACA Marci Paulsen

SUMMARY OF CALCULATIONS

Total Bill = \$21,953.98

Stillman Amount owed \$ 2040.00

Balance = \$19,913.98

2/3 Payment required for
two matters won by
Chief Koval = \$13,275.99

Balance = \$ 6,637.99

Payment required for
33/51 counts won
by Chief Koval = \$ 4,295.17

Minimum Amount the City owes the Chief: \$19,611.16

Balance = \$ 2,342.82

Payment for
Half/half ruling = \$ 1,171.41

Total Amount to be paid by the City under erroneous legal theory = \$20,782.57

CHIEF KOVAL FEE REIMBURSEMENT: WHAT COUNTS WERE NOT SUSTAINED?

Complaint and Count	Shorthand Description of Standard	Standard Mentioned in PFC Ruling?
Kilfoy-Flores (K-F) #1	Introduction	Yes
K-F # 2	APM	No
K-F # 3	Mission	No
K-F # 4	Integrity	Yes
K-F # 5	Dignity	Yes
K-F # 6	Community Partner	No
K-F # 7	Proficiency	No
K-F # 8	Courtesy/ Respect	Yes
K-F # 9	APM 2-33	Yes
K-F # 10	Unruly	Yes
K-F # 11	General Duties	No
K-F # 12	SOPs	No
K-F # 13	Functional Norms	No
K-F # 14	Chain of Command	No
Kilfoy-Flores Total		6/14
Irwin (I) # 1-2	Introduction	Yes
I # 3-4	APM	Yes
I # 5-6	Mission	No
I # 7-8	Integrity	Yes
I # 9-10	Dignity	Yes
I # 11-12	Exceptional Service	No
I # 13-14	Community Partner	No
I # 15-16	Proficiency	No
I # 17-18	Diversity	No
I # 19	Equal Protection	No
I # 20	Harassment	No
I # 21-22	Courtesy	No
I # 23-24	APM 2-33	No
I # 25-26	Unruly	Yes
I # 27	False Statement	No
I # 28	Harassment	No
I # 29	APM 3-5	No
I # 30-31	General Duties	No
I # 32-33	SOPs	No
I # 34-35	Functional Norms	No
I # 36-37	Chain of Command	No
Irwin Total		12/37