

Veldran, Lisa

From: Allen, Heather
Sent: Tuesday, May 02, 2017 4:20 PM
To: Veldran, Lisa
Subject: for the files

Hi Lisa,

Greg passed this along. He said it could be added to the list of handouts in Legistar.

Thanks, H

From: Gregory Gelembiuk
Sent: Sunday, April 30, 2017 4:25 AM
To: Rummel, Marsha; district5@cityofmadison.com; district14@cityofmadison.com; district16@cityofmadison.com; district18@cityofmadison.com
Subject: Paulsen's memo

Dear Committee Members,

Marci Paulsen's memo, claiming that the Council doesn't have the authority to issue specific policy directives (especially regarding use of force policy), is pure politics masquerading as legal analysis. Do not take these claims at face value. The opinions Paulsen is expressing are in direct contradiction with other, far more thorough, legal analyses.

It's a prime example of something that's a problem for cities nationally – city attorney offices (with an intrinsic conflict of interest, given their close working relationship with police departments) using questionable legal arguments to block any meaningful police reform. It's exactly what happened in Ferguson and in multiple other cities. As the Associated Press has reported: "City Lawyers are the Weak Link in Police Accountability, Records Show"

I think it's critical that your committee find a mechanism to solicit legal opinions on this matter (i.e. regarding Council powers) from outside attorneys who do not have an inherent conflict of interest and wouldn't be entangled in politics.

As a matter of law, Paulsen's opinion (which is scant on any real legal analysis) appears to be simply wrong.

1. Role of the Police and Fire Commission.

Paulsen states: "*Wis. Stat. § 62.13(1) clearly establishes that any police department within the City will be overseen by a board of police and fire commissioners.*"

Unless optional powers specified in Wis. Stat. § 62.13 (6) are invoked by referendum, the PFC only has very narrow powers, as a personnel board (responsible for hiring, promotion, demotion, suspensions, firing), not full oversight

powers. If optional powers are invoked by referendum, a PFC has the additional power *“To organize and supervise the fire and police, or combined protective services, departments and to prescribe rules and regulations for their control and management.”*

Madison PFC Staff Attorney Scott Herrick has opined, in verbal discussions, that the power to prescribe rules and regulations for the police department inherently pre-exists in the Common Council (that a Common Council has those powers to start with), and that a PFC optional powers referendum merely shifts those powers to a PFC.

Either Paulsen is wrong, or Scott Herrick is wrong. And Herrick’s interpretation is far more consistent with other legal analyses and simple common sense.

2. Paulsen’s position would appear to be inconsistent with the 2005 memo by Madison Assistant City Attorney Carolyn Hogg (which May signed off on at the time). That memo specifically discusses the power of the Common Council to issue orders to the Chief regarding use of force issues. It concludes:

“Based on the foregoing, I conclude the Common Council likely has the authority to adopt a resolution prohibiting the use of tasers by the police department. This conclusion is not without reservation, given the Police Chief’s authority as commanding officer of the department and his statutory responsibilities to establish standards regulating use of force. Having the Council interject itself into areas which call for technical law enforcement expertise (either through a direct order prohibiting the use of tasers or via a budgetary action which prohibits expenditures for tasers) may not ultimately be the most prudent and safest course of action for officers and citizens alike. However, the Council’s authority is not limited merely to those actions which outsiders might believe are wise or correct – otherwise its jurisdiction would be unnaturally narrowed indeed.”

That memo clearly includes a more thorough analysis of the legal issues than Paulsen’s. It concluded that the Council appeared to have the authority to issue a directive that was very specific regarding use of force. And note that this (prohibiting use of tasers) is inherently a use of force policy directive.

3. Paulsen’s claims are in contradiction to the far more thorough analysis by Matthew Flynn in Wisconsin Law Review 1131 1974. The core statutes have not changed, and it appears that little additional relevant case law has been developed in the interim.

4. Though there isn’t a huge amount of case law on the power of city councils to issue lawful orders to police chiefs, one key case is Christie v. Lueth (1953), 265 Wis. 326, 334, 61 N. W. (2d) 338

The La Cross City Council had issued an order to the police chief to bring charges against a particular officer with the PFC. The court upheld this as a lawful order.

The relevant language in the resolution was:

"Be it further resolved that the common council direct the chief of police to commence proper proceedings in the Christie case immediately by filing charges to be prosecuted by the city attorney. . . ."

The most relevant excerpts from *Christie v. Lueth* (1953):

"Appellant contends next that by the resolution the legislative branch of the city government invaded the executive and judicial prerogatives in violation of the constitutional principle of the independence of the three branches. The common council has not attempted to perform any of the functions of the other divisions of government. It has pointed out what it considers the duty of executive officials, the mayor and chief of police, and directed them to get busy. The duties of the mayor will be touched upon later."

*"The chief of police shall have command of the police force of the city under the direction of the mayor. It shall be his duty to obey all lawful written orders of the mayor or common council. . . ." Sec. 62.09(13), Stats. We are unable to find anything unlawful in this direction by the council to the chief in a matter concerning his department, nor has he or any other representative of the executive branch complained that the functions of that branch are thereby invaded by the city legislature. The same situation was presented in *La Abra Silver Mining Co. v. United States* (1899), 175 U.S. 423, 20 Sup. Ct. 168, 44 L.Ed. 223. There congress directed the attorney general to commence an action to determine whether or not a claim which had been allowed by arbitrators against the Republic of Mexico was in fact fraudulent. The mining company contended that this legislation was an invalid interference with the constitutional separation of executive and legislative powers. The supreme court of the United States held that it was not. We hold that the resolution, stopping where it did, was not void as an unconstitutional interference by the common council with the functions of another branch of the city government."*

Two important points about this decision:

A. The court upheld an order that was very specific – an order that the police chief file charges with the PFC against a particular officer. The court rejected the argument that such a highly specific order invaded the functions of the chief and executive branch, and was outside the purview of the city council.

B. Wis. Stat. § 62.13 (5) "*Disciplinary actions against subordinates*" lays out roles for the chief in bringing charges against officers with the PFC. But the court upheld that the council had the authority to order the chief to take specific actions in this domain (filing of charges with the PFC). Paulsen attempts to argue that a statute requiring chiefs to "prepare in writing and make available for public scrutiny a policy or standard regulating the use of force" means that the council cannot issue orders regarding use of force. But if the court upheld an order requiring a chief to file PFC charges against an officer (even though there's statutory language on a chief's role/power in this matter), the same logic would apply to orders on use of force policy (i.e. that a council can issue lawful orders, that are specific, to a chief on

use of force policy). [As an aside I'll also note – the argument that the Council issuing a small number of very particular directives on use of force policy is somehow demoting the chief is a ridiculous one. It's not like the Council would be taking over writing all use of force policy.]

5. PFCs were created as a Progressive Era anticorruption measure, because mayors and city councils were appointing police chiefs on a quid pro quo, share of the spoils basis (they'd get kickbacks). But it was not the intent of the Progressive Era reformers (who created the PFC mechanism) to leave police departments without any accountability to elected officials (i.e. they never intended that city councils and mayors wouldn't have any power over police department policies and practices). PFCs were just created as personnel boards, to be in charge of hiring/firing, separating out this function from all the other oversight powers (which were recognized as being retained by the mayor and city council).

Paulsen's interpretation is inherently perverse. It would leave no-one with direct power over the police (only indirect power of the purse, and PFC power to hire/fire). Such an interpretation reflects confusion about the role of the PFC, which is not a general oversight body (unless optional powers are invoked).

Moreover, Paulsen's logic, which would apply to mayors as well as city councils, would appear to be inconsistent with State ex rel. Davern v. Rose. In State ex rel. Davern v. Rose, the court ascribed sweeping executive authority (over police and fire departments) to the mayor. The court compared the role of the mayor to that of the President of the U.S., conferring on the mayor all the powers of a chief executive except where expressly limited. From Davern: "the [mayor shall be the]...chief executive officer and the head of the fire department and of the police in said city."

6. I asked attorney William Turner about this matter, sharing with him all the underlying documents (city attorney memos, etc.). I'll note that Turner has, over the years, written extensively about issues of governmental structure, separation of powers, etc.

I'd like to share some of his reply:

"I am happy to offer my opinion, but there is nothing here that an intelligent citizen who can read English wouldn't understand. I realize you don't have this problem, but don't let the city attorney, or any attorney, buffalo you into thinking there is any magic in the law. if it defies common sense, chances are it's bad law."

"In the U.S., as you are likely aware, states have important, independent political and administrative responsibilities. We fight all the time about where to draw the line between state power and federal power, but no one argues that the states are devoid of independent powers. Cities, by contrast, are legal and political poodles. States have nearly unfettered power to define what cities may or may not do."

The sentence someone (you?) underlined in Wis. Stat. 62.09(13), "The chief shall obey..." a settles the matter, to my mind. 62.11(5), which grants powers to cities subject only to limitation by "express language," further buttresses the point. It seems obvious to me that setting policy as you're trying to do here falls well within the powers the city has under this section. If they can't point to specific statutory language prohibiting what you're trying to do, they're full of shit.

The statutory language on use of force policy adds nothing. I would not get too far into the weeds of the questions about what a Commission may or may not do. It's not completely irrelevant, but it is a distraction from the key question -- what powers does the Council have?

I agree with the opinion you attribute to Scott Herrick -- Cities may be poodles of states, but they necessarily possess the essential powers of sovereignty where their writ runs."

"If they're schlepping the separation of powers argument, it's really weak. Legislatures are primary in our system. That the Constitution defines the legislative power first is not an accident. No laws, no government. Obviously, the executive and judiciary have their own powers that the legislature should not invade, but the legislature kind of has the final say, except in the special case of courts finding that laws violate the Constitution, which is not an issue here.

The logic of administrative agencies is that they command highly technical knowledge that members of Congress cannot have, at least most members -- we have an EPA because most members of Congress are not experts in the areas of science one needs to do that kind of work -- and the same is true of the Madison Common Council relative to the police department. This militates in favor of legislatures not meddling too much in the business of administrative agencies, but the legal point remains that administrative agencies exist only at the pleasure of the legislature. The legislature still gets to set policy for the agency. "

"You point to the memo from 2005, with the previous city attorney signing off. My question: what changed between then and now. I would need to see a specific change in statute, or a decision by a court on the exact same, or very similar, question. Else, why the change of opinion?"

I inquired further, and William Turner responded with the following:

"If I understand, the core issue is directing the police to emphasize de-escalation and avoid potentially lethal responses.

The memo you sent does not have much by way of legal argument in it. She just says that revising the deadly force policy is "not within the purview" of the Council, then talks about how it is a "specialized and technical" issue that the Chief alone should decide. This gets to what I said before about the relationship between legislatures and administrative agencies, which police forces are in a sense.

So, the most relevant statute reads, "Wis. Stat. § 62.11(5) Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language." This is very broad language, both in terms of what domains the city may manage and control, "city property, finances, etc." and the means it may use, "by license, regulation, suppression, etc." "and shall be limited only by express language." My answer to this memo is that the Council may tell the police department whatever it wants to, unless someone can point to "express language" forbidding them.

As you say, this is politics, not law."

Sincerely,

Gregory Gelembiuk