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**VIA E-MAIL**

June 12, 2020

Michael Haas, City Attorney  
City Attorney's Office  
210 Martin Luther King, Jr. Blvd., Room 401  
Madison, WI 53703

Dear Attorney Haas:

I serve as general legal counsel to the Board of Police and Fire Commissioners of the City of Madison (PFC). I recently reviewed a proposed resolution regarding creation of an MPD Ad Hoc Recommendation Oversight Committee/Independent Civilian Oversight Committee and a proposed ordinance regarding creation of an Independent Police Auditor position within the Madison Police Department.

The purpose of this letter is to outline my concerns regarding potential encroachment on the statutory authority of the PFC under Wis. Stat. § 62.13. However, I also wanted to express my willingness, on behalf of the PFC, to meet with the Committee(s) (and other stakeholders) currently considering these changes. The President of the PFC, Nia Trammell, is also willing to meet.

The PFC consists of five (5) citizens. It is an independent body created under Wis. Stat. § 62.13. Under this statute, the PFC has powers and duties regarding hiring, promotion, and major discipline of police and fire personnel.

With regard to the police chief and fire chief positions, Wis. Stat. § 62.13(3) provides that the PFC "shall appoint the chief of police and the chief of the fire department or, if applicable, the chief of a combined protective services department, who shall hold their offices during good behavior, subject to suspension or removal by the board for cause."

With regard to hiring of subordinates, the PFC has the following powers and duties:

- Approval of eligibility lists consisting of candidates who have met the requirements for the position.
- For the purpose of creating eligibility lists, the PFC "shall adopt, and may repeal or modify, rules calculated to secure the best service in the departments" which

“shall provide for examination of physical and educational qualifications and experience, and may provide such competitive examinations as the board shall determine, and for the classification of positions with special examination for each class.”

- The examination “shall be free for all U.S. citizens over 18 and under 55 years of age, with proper limitations as to health and, subject to ss. 111.321, 111.322, and 111.335, arrest and conviction record. The examination, including minimum training and experience requirements, shall be job-related in compliance with appropriate validation standards and shall be subject to the approval of the board and may include tests of manual skill and physical strength. All relevant experience, whether paid or unpaid, shall satisfy experience requirements.”
- The PFC “shall control examinations and may designate and change examiners, who may or may not be otherwise in the official service of the city.”
- Approval of all candidates recommended for initial hire by the police chief or fire chief.

The PFC has adopted detailed rules governing the initial appointment process, including, but not limited to, rules regarding the application process, examination process, and background check process. The PFC monitors the development of the eligibility lists and carefully considers the procedures and criteria used by the chief in developing hiring recommendations based on the eligibility lists. For instance, the PFC customarily requests a statistical analysis of various demographic characteristics, including age, race, sex, educational level and field of study, language proficiency, and previous professional experience. The PFC also has the authority to approve the chiefs’ final recommendations for appointment following completion of the applicable probationary period.

With regard to promotions, the PFC has the statutory authority to approve all recommendations for promotion by the police chief or fire chief. The PFC has adopted rules governing the promotion process, including a probationary period for all promotional appointments. For each candidate recommended for promotion, the PFC assigns at least one Commissioner to review the personnel file and any PS&IA files. The Commissioner assigned to examine the candidate’s file(s) then makes a recommendation to the PFC at the next regular meeting of the PFC. In addition, the PFC customarily invites candidates for promotion to command-level ranks to an informal lunch (noticed as a Special Meeting) to conduct a more complete review of the recommendation.

With regard to disciplinary action against subordinates, the PFC has the following powers and duties:

- Suspension of a subordinate pending the disposition of charges.
- Hear charges (or a complaint) filed against the subordinate, make findings, and impose penalties consisting of suspension or reduction in rank, suspension and reduction in rank, or discharge.
- In order to impose penalties, the PFC must determine that just cause exists to support the charges (or complaint) based on the seven (7) standards provided

under Wis. Stat. § 62.13(5)(em), to the extent applicable. The seven (7) standards are as follows:

- 1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
- 2. Whether the rule or order that the subordinate allegedly violated is reasonable.
- 3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
- 4. Whether the effort described under subd. 3. was fair and objective.
- 5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
- 6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
- 7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

A disciplinary matter is normally commenced before the PFC when charges (or a complaint) are filed by the chief or an “aggrieved person” (which may include a citizen if he or she is an aggrieved person). The PFC has adopted detailed rules governing the charge/complaint process and hearing process. If a complainant files charges (or a complaint) against one or more officers, he or she must appear in person (or through his or her attorney or representative) for at least one hearing session, typically for more than one such occasion, in order to call witnesses, be subject to cross-examination, and generally to present his or her case. As a quasi-judicial body, the PFC does not directly or actively investigate or review complaints.

In light of the foregoing, the proposed resolution for creation of the MPD Ad Hoc Recommendation Oversight Committee/Independent Civilian Oversight Committee contains some features that appear to encroach upon the statutory authority of the PFC (and rules created by the PFC pursuant to statute). For instance, the resolution describes the following functions:

- “With input from the Independent Monitor, conduct an annual review of the Chief of Police to assess her or his performance in office, and submit a report to the designated City Officials responsible for completing the annual performance review of the Chief as recommended by the Ad Hoc Committee, **including recommendations as to whether the Chief has satisfactorily performed his or her duties or whether the Chief has failed to perform satisfactorily, thereby constituting ‘cause’ for referral to the PFC with a recommendation for dismissal.**” (Emphasis added in bold.)
  - The determination of whether “cause” exists to discharge a chief rests with the PFC, including the procedure(s) applicable to making this determination. Therefore, the bolded language is potentially problematic.

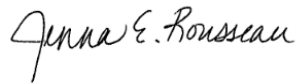
- “Make policy-level recommendations regarding **discipline**, use of force, and other policies; rules; **hiring**; training; community relations, and **the complaint process**.” (Emphasis added in bold.)
  - The hiring process for subordinates (as well as for the chiefs) is within the statutory authority of the PFC. The PFC also has detailed rules to address the hiring process and formation of eligibility lists. Thus, the bolded language regarding hiring is potentially problematic.
  - In addition, the process for imposing discipline with regard to subordinates is governed by Wis. Stat. § 62.13 and is within the statutory authority of the PFC. The PFC also has detailed rules to address the disciplinary process and charge/complaint process. Thus, the bolded language is potentially problematic.
- “Furnish an annual public report to the Mayor and Common Council regarding the board’s assessment of the work of the monitor’s office; the board’s activities during the preceding year; concerns expressed by community members; the board’s assessment of the police investigative and **disciplinary processes**; recommendations for ways that police department can improve its relationships with the community; and recommendations for changes to police department policies, rules, **hiring**, training, and **the complaint process**.” (Emphasis added in bold.)
  - See concerns above.
- “In order to determine whether the Monitor’s Office is effectively performing its duties and to make recommendations to the Chief of Police and Monitor’s Office regarding investigations, **determinations as to whether department rules or policies have been violated, and the appropriateness of disciplinary sanctions**, if any, the Board should receive regular reports from the Monitor’s office and should be allowed to review pertinent portions of the personnel files of personnel and PSIA files, including statements of personnel.” (Emphasis added in bold.)
  - The PFC must determine whether a rule or order has been violated, along with related considerations, for purposes of determining whether just cause exists to impose discipline. Thus, if another individual or body is performing this task, it will encroach upon the statutory powers and duties of the PFC.
  - In addition, the resolution does not address what the next step would be if the Committee and/or Monitor determines that a policy has been violated and discipline is warranted. For instance, who would file charges (or a complaint) before the PFC? Would that individual or body have standing to file charges or a complaint? Would the same individual or body investigate *and* prosecute the matter before the PFC?

The proposed ordinance to create the Police Auditor/Monitor position states that “the Police Auditor provides independent civilian oversight to Police Department operations to ensure police accountability to the public in an independent, unbiased manner.” Although the PFC does not have

general oversight or general supervision regarding day-to-day management of the police department, it seems likely that the Police Auditor's responsibilities will overlap with the PFC's statutory powers and duties in other ways. For instance, the determination of whether a subordinate has violated a policy or order, such that discipline should be imposed, ultimately rests with the PFC. The PFC determines, based upon charges (or a complaint) and a hearing, whether just cause exists to impose discipline. Therefore, certain aspects of the role of the Police Auditor may conflict with the statutory authority of the PFC.

Thank you for your time and consideration of this letter. Please let me know if there is any interest in scheduling a meeting to discuss this further. My direct telephone number is 844.833.0828.

Respectfully Submitted,  
STRANG, PATTESON, RENNING, LEWIS & LACY, S.C.

A handwritten signature in cursive script that reads "Jenna E. Rousseau".

Jenna E. Rousseau  
*Legal Counsel to the Board of Police and Fire Commissioners of the City of Madison*

cc: Nia Trammell, President of the PFC (via e-mail)  
Assistant City Attorney Marci Paulsen (via e-mail)