

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

Date: May 18, 2009

OPINION NO. 09-001

TO: Alder Michael Schumacher

FROM: Michael P. May, City Attorney

RE: **Alders and Personnel Matters before the Police and Fire Commission**

You have requested my opinion on the manner in which Alders could provide information or otherwise make their views known on matters related to the promotion of Police Officers, as recommended by the Chief of Police, and approved by the Police and Fire Commission (PFC). I will consider the question only as to Police Officers, although similar issues might arise with Firefighters.

Short Answer

As will be set out in detail below, I recommend that Alders utilize the existing system established by the Madison Police Department (MPD). Under this system, compliments, complaints or concerns about an officer's conduct are to be made in writing to the Chief of Police. Such communications become part of the employee's personnel file. The Police Chief and the PFC then review these matters at the time that the officer is considered for promotion.

There is also a more formal complaint process that any citizen may utilize; such complaints are handled by the Professional Standards & Internal Affairs Unit (PS&IA) of the MPD. It should be noted that the informal communications mentioned above may also trigger a PS&IA investigation, if the information provided implicates a possible rule violation. My understanding is that this investigatory/disciplinary process was not part of your inquiry.

Discussion

The question you raise is a mixed question of legal and policy determinations. Because of this, I will first discuss the law applicable to the situation you discuss, will then describe the current procedure for operation of the Police Department and the PFC with respect to personnel matters, and will finally explain why I make the recommendation outlined above.

Legal Attributes of the Police and Fire Commission

Under Wisconsin law, Madison is required to have a PFC. This is pursuant to Sec. 62.13 of the Wisconsin Statutes. By statute, the powers and operations of a PFC are a matter of statewide concern and may not be modified in any significant respect by municipalities. Sec. 62.13(12), Wis. Stats. In accordance with Sec. 62.13(4), Wis. Stats., chiefs appoint subordinates, both initial hires and promotions, subject to approval by the PFC.

One of the major purposes of a PFC is to remove the appointment and promotion of police officers and firefighters from the vicissitudes of political processes and municipal elections. *Conway v. Board of Police and Fire Commissioners of City of Madison*, 262 Wis. 2d 1, 20, 662 N.W. 2d 335 (2003), citing *State ex re. Pieritz v. Hartwig*, 201 Wis. 450, 230 N.W. 42 (1930). It is to be “an impartial body that operates independently of the city itself ...” and “is designed to prevent the board from operating as an agent of a city official or police or fire chief.” *Heil v. Green Bay Police and Fire Commission*, 2002 WI APP 228, ¶ 14, 256 Wis. 2d 1008, 1016, 652 N.W. 2d 118 (2002), citing other cases. In furtherance of that, the PFC is given significant independence. It constitutes its own legal entity for purposes of suing and being sued. *Racine Fire and Police Commission v. Stanfield*, 70 Wis.2d 395, 402, 234 NW 2d 307 (1975). As such an independent entity, it also has its own legal counsel. When complaints are brought by the Chief of Police before the PFC seeking discipline or removal of an officer, the City Attorney represents the Chief of Police, while the PFC has its own attorney.

Moreover, the Madison PFC is not a body which is entrusted with operating the Police or Fire Department. While some PFC’s are given the “optional powers” set out in Sec. 62.13(6), Wis. Stats., Madison’s PFC does not have those powers. Thus it is the Chiefs of Police and Fire who have the obligation for operational control of the departments. While these positions are subject to some oversight by the Mayor and Common Council under Sec. 62.09 (8) and (13), Wis. Stats., the chiefs enjoy a great deal of independence. This issue is explored in some length in a report prepared by our office with respect to a resolution on tasers offered some years ago. See Report of the City Attorney on Resolution ID # 00572, April 19, 2005.

In short, the Madison PFC operates as an independent personnel body with respect to matters before the Police Department.

PFC and MPD Procedures

In furtherance of the above legal guidelines and pursuant to the authority granted under Sec. 62.13 (4) and (5), Wis. Stats., the PFC has adopted rules to guide it in the exercise of its statutory responsibilities. These rules address the entry level hiring process as well as appointment to promoted ranks. In addition, MPD has developed a very specific procedure to assist the PFC in undertaking its personnel obligations. As mentioned above, the PFC must approve the recommendations of the Chief of Police

with respect to officer promotion or hiring. The PFC has additional obligations with respect to hiring.

As part of its management responsibilities, the MPD maintains a personnel file on each and every officer in the department. Comments that are received from any member of the public are collected within these files. The comments may be positive, negative, or merely neutral. If they are deemed relevant to future decisions with respect to the officer's advancement, they are maintained in the file. The MPD has developed a specific form – the "Officer Conduct Reporting Form" -- which may be used to provide these comments to the Department, the Chief of Police, and eventually the PFC. This form, together with a letter from the Chief of Police and a summary of the complaint resolution process, are available on the MPD website at:

<http://www.cityofmadison.com/police/about/professionalStandards.cfm>

A copy of those documents are attached.

Use of the personnel file in the decision-making process with respect to an officer's advancement has been formally incorporated into the promotional procedures of both the Police Chief and the PFC. Pursuant to an MOU between the Chief (City) and the MPPOA, the Chief's process for selection provides that each candidate's captain will review the personnel and complaint files as well as the resume for the candidate. In addition, the commanding officer of the candidate makes a presentation to the MPD Management Team to give a comprehensive picture of the candidate. This includes information in the candidate's personnel and complaint files. It is my understanding that this review has historically been part of the Chief's promotional process.

The PFC's rules with respect to appointments by promotion are set forth in PFC Rule 4.f. On the matter of personnel file review, the PFC's process is detailed and explicit:

At each regular meeting of the Board, the Chief shall inform the Board regarding any promotional appointments which the Chief then intends to present to the Board at either of the next two Board meetings. During the interim between receiving that information and acting on the Chief's recommendation, any Commissioner by arrangement with the Chief may examine the complete personnel record of the prospective appointee. The Board shall act on recommendations of the Chief for promotional appointment at any regular or duly scheduled special meeting following such opportunity for examination of the appointee's record. PFC Rules and Regulations 4.f.v.

In practice, either some or all of the PFC actually review the entire personnel file for each officer being considered for promotion. The existing systems established by the MPD and the PFC ensures that compliments, complaints and concerns about an

officer's conduct can be folded into an orderly review process and given due consideration by both the Police Chief and the PFC at the appropriate stage.

I noted in my Short Answer to this opinion that my understanding is that the MPD and PFC disciplinary process was not part of your inquiry. Consequently, this opinion does not address that matter in any depth; I include only the following brief summary. There is also a specific and much more detailed procedure with respect to complaint proceedings seeking suspension, demotion or removal of a police officer. The procedure ensures the Chief of Police, as to MPD's investigatory process and disciplinary decision, and the PFC, as part of its quasi-judicial proceedings and final determination, comply with statutory requirements and satisfy the "seven just cause standards" in Sec. 62.13(5), Wis. Stats., as to any discipline imposed. Sec. 62.13(5), Wis. Stats., "provides procedural steps to be followed in proceedings against a member of a municipal police department"; "embodies the 'substantial elements' of a common-law hearing ... by providing for the filing of a written formal charge ..., a public hearing at which the officer may be represented by counsel and may subpoena witnesses; and an appeal to the circuit court." The statutory procedure has been held by the Wisconsin Supreme Court "to meet the requirements of due process." *State ex. rel. Richey v. Neenah Police and Fire Commission*, 48 Wis.2d. 575, 580-81, 180 N.W.2d 743 (1970).

Finally, it should be noted that because of the legal nature and attributes of the PFC outlined above, it does not have the same procedures that many City committees have. There is no required public comment period before the PFC; Alders do not enjoy the right of participation at the PFC; it has adopted a series of rules and policies independent of those established by the Common Council for other City committees, which are considered arms of the Council or the Executive, or both. In one of the cases cited above, *Heil v. Green Bay Police and Fire Commission*, a liaison from the common council participated in discharge proceedings before the Green Bay PFC, but did not have the right to vote. The court held that the proceedings were void because the officer's due process rights had been violated by the participation of this outside person.

Recommendation:

Based upon the above-discussed legal limitations, I am very concerned about Alders appearing at meetings of the Police and Fire Commission and making statements about individual police officers, at least outside of a formal complaint proceeding. As with other citizens, Alders can certainly bring formal complaints if they believe it is warranted. However, appearance at these meetings begins to raise troubling questions of whether the Alders are -- in spirit if not in law -- crossing the line of independence from political action that the PFC has been established to prevent. This concern is highlighted by the outcome in the *Heil* case mentioned above.

Alders may, as may any other citizen, submit comments to the Chief of Police with respect to the performance of any officer. Those comments are gathered and will be available to the PFC when it deliberates upon future personnel actions with respect to that officer.

I recommend that the Council members take advantage of this existing MPD procedure. I further recommend that the comments actually be submitted in a written, paper document. While the MPD attempts to gather comments filed by email, it may be difficult in an individual case to determine a person's intentions; i.e., whether a person is commenting on an MPD policy, raising a concern or passing on a compliment about the performance of a particular officer, or simply complaining about something that may or may not actually reflect on the officer's conduct. Thus, a paper copy delivered to the Chief of Police will not be mistaken as having some other intention.

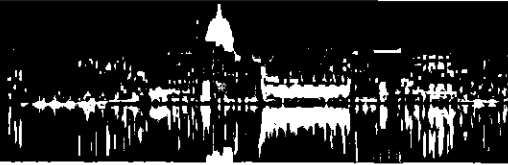
Michael P. May
City Attorney

Attachments

SYNOPSIS: Due to the independent nature of the Police and Fire Commission, Alders who desire to comment on the performance of police officers or firefighters should use the established process of filing written comments with the Departments.

cc: City Clerk
Mayor Dave Cieslewicz
All Alders
Chief Noble Wray
Chief Debra Amesqua

"Policing in
partnership with
our community"



City-County Building
211 South Carroll Street
Madison, WI 53703-3303
Phone: 608 266-4022
TDD: 608 266-6562
www.madisonpolice.com

Dear Citizen:

Thank you for contacting the Madison Police department to express your concerns. The Madison Police department is committed to investigating complaints in an open and fair manner with determining the truth as our primary objective. To assist us with this effort, please provide as much information as possible, including specific dates, times and the names of officers involved. State the reasons you believe the officer's conduct was inappropriate and provide us with the names of witnesses and how they can be contacted. It is especially important that you provide us with your contact information as well. You may use additional paper as needed.

Before completing and signing your statement, please read the section regarding confidentiality and select the statement of your choice. Your complaint and related documents are a public record and subject to disclosure upon a request for documents from the news media or any other person. The Department routinely discloses summaries of complaint investigations and their dispositions to the news media. If you request confidentiality, the Department will make every legal effort to respect your request. However, it is not possible to guarantee confidentiality.

It is also important to note that depending upon the nature of your complaint, it may not be necessary for you to submit your complaint in writing. Many citizen complaints can be more efficiently and appropriately addressed by speaking directly with the employee's Commanding Officer or Supervisor.

If you choose to submit your complaint in writing, you may mail it or drop it off in person at:

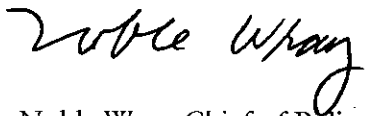
Madison Police Department Professional Standards
211 South Carroll Street (GR28)
Madison, WI 53703-3303

You may contact the Professional Standards and Internal Affairs Unit to discuss the nature of your complaint. The Internal Affairs sergeant can also answer any questions you may have about the process. The Professional Standards and Internal Affairs Unit is open Monday through Friday during regular business hours. The direct telephone line is (608) 266-6502.

You may decide to take your complaint directly to the Madison Police and Fire Commission (PFC). Forms for that purpose are available in the city Clerk's Office and the Mayor's Office. In some cases, the Department or officers involved may take your complaint to the PFC. Any proceedings before the PFC are public. Documents related to PFC proceedings are public records and are generally subject to disclosure under Wisconsin Law.

Lastly, the Department is required by State Law to inform you that, "**whoever knowingly makes a false complaint regarding the conduct of law enforcement officer is subject to a Class A forfeiture.**"

Sincerely,

A handwritten signature in black ink that reads "Noble Wray". The signature is written in a cursive, flowing style.

Noble Wray, Chief of Police

Enclosure: Complaint Statement Form



MADISON POLICE DEPARTMENT Officer Conduct Reporting Form

Complainant and Contact Information

NAME		
ADDRESS		
CITY	STATE	ZIP CODE
HOME PHONE	WORK PHONE	CELL PHONE
STATEMENT GIVER IS <input type="checkbox"/> Aggrieved Party <input type="checkbox"/> Witness to Incident <input type="checkbox"/> Other		

Involved MPD Personnel and Allegation

OFFICER(S) NAME AND/OR NUMBER
MPD CASE NUMBER (IF AVAILABLE)
DATE AND APPROXIMATE TIME OF INCIDENT
LOCATION
ALLEGATION(S)

Please attach a description narrative of the incident.

Please Read Carefully Before Signing

Choose one statement regarding confidentiality:

- I request my name be kept confidential.
- I request my name, address and phone number be kept confidential.
- I will not provide any information regarding this matter unless I am pledged confidentiality as indicated above.
- I do not request confidentiality in regard to this matter.

By signing the line below, I am affirming that I have read the letter from the Chief of Police pertaining to the complaint process and confidentiality; the details contained in my statement are true and correct to the best of my knowledge.

Signature

Date

PS & IA USE ONLY			
DATE	EMPLOYEE	CR #	INTAKE NAME

HOW TO FILE A COMPLAINT

The Madison Police Department is committed to investigating complaints in an open and fair manner with truth as its primary objective. Therefore, this Department will accept complaints against its employees, policies or procedures, and investigate all such complaints to the appropriate disposition.

Complaints will not be investigated if the complaint is received more than ninety (90) days after the alleged incident, except if the complaint involves an alleged criminal violation, or the complainant can show good cause for not making the complaint within the specified time limit.

COMPLAINT OPTIONS

Generally, citizens are encouraged to pursue their complaint through the internal process. However, you should know about both options available to you:

1. You may file a complaint with the Professional Standards Office within the office of the Chief of Police, or

2. You may file a complaint against a commissioned employee with the Board of Police and Fire Commissioners, as provided by State law. This is done by filing your complaint through the Mayor's Office, Room 403, or the City Clerk's Office, Room 103, both in the City-County Building.

COMPLAINT PROCESS

1. Call, write, e-mail, or stop by the Chief's Office in GR-28 of the City-County Building, 211 S. Carroll Street, Madison, WI 53703 (608) 266-6502.

Complaints placed after 4:00 p.m. or on weekends should be directed to the Officer-in-Charge at (608) 266-4418.

2. Your complaint will be filed with the Professional Standards Unit, within the Executive Office. You will receive confirmation that your complaint has been received, and an indication as to whether your complaint will or will not be investigated.
3. Upon completion of an investigation, the Lieutenant assigned to investigate your complaint will make one of the following determinations:

Unfounded

The investigation conclusively showed the incident complained of did not occur, or that the individual named in the complaint was not involved.

Exonerated

The incident complained about did occur, but was justified, lawful and proper.

Non-Sustained

The investigation failed to reveal enough evidence to clearly prove or disprove the allegation.

Sustained

The investigation disclosed enough evidence to clearly prove the allegation.

The Chief of Police reviews all findings. When a finding of "sustained" is reported, the Chief will decide whether to take immediate corrective action or to forward the report to the commanding officer of the individual named in the complaint. Appropriate corrective action, which may include counseling, training, oral reprimand, written reprimand, suspension, demotion, or dismissal, may be taken. The Chief of Police will make the final determination.

A notary public is available at the Madison Police Department at no charge.

INFORMATION NEEDED

The supervisor assigned to investigate your complaint will ask for the following information:

- Your name, address and phone number;
- The date and time of the incident about which you are complaining;
- The names, addresses, and phone numbers of any witnesses, if available;
- If the incident involves an arrest, the name, address, and phone number of the person arrested, if known;
- The name, badge number, and car number of the officer(s) involved, if known;
- Details of the incident that prompted your complaint.

The Madison Police Department is in compliance with the equal opportunity policy and standards and all applicable state and federal statutes and regulations relating to nondiscrimination in employment and service delivery.



MADISON POLICE DEPARTMENT
211 S CARROLL ST
MADISON WI 53703
Phone: (608) 266-4022
Fax: (608) 266-4855

MADISON POLICE DEPARTMENT

COMPLAINT RESOLUTION PROCESS



The best way to insure that we have an honest and excellent police department is to first police ourselves.

Noble Wray, Chief of Police