

**CITY OF MADISON  
CITY ATTORNEY'S OFFICE  
Room 401, C.C.B.  
266-4511**

October 6, 2003

**OPINION NO. 03-005**

TO: Fire Chief Debra H. Amesqua

FROM: James L. Martin, City Attorney

RE: **Procedure Upon Absence of the Fire Chief**

You have asked the opinion of the City Attorney regarding the meaning of certain ordinance provisions relating to the performance of the duties of the Fire Chief in case of the Fire Chief's absence. More specifically, you inquire about the meaning of the word "absence" in the context of such ordinances. I understand that your routine practice regarding discharge of the Chief's duties is two-fold. It is your practice to remain in close telephone contact with your command staff when away from the Fire Administration Building, out of the City or out of State. In such circumstances you are prepared to discharge the duties of your office, via telephone or internet communication although you may choose to assign "point person" responsibility for various matters to particular commissioned or non-commissioned staff as you deem appropriate. During such times, you are prepared to return to the City via car or plane if necessary. Additionally, the Officer in Charge for each shift, as the most senior rank, is in charge of Fire Department Operations at such times. In contrast, it is your practice to advise personnel that you will be absent from duty, when circumstances require you to be away from the Fire Administration Building, or out of the City or out of the State *and* not within effective and efficient telephone/internet communication or available to return to the City. In the latter case, you have designated an Assistant Chief to discharge the duties of Fire Chief in your absence. You ask whether this process conforms with your authority and responsibility as Fire Chief under applicable statutes and ordinances.

**The Law**

**Statutes**

The Fire Chief is appointed by the Board of Police and Fire Commissioners (PFC) and shall hold office during good behavior, subject to suspension or removal by the PFC for cause. § 62.13(4), Wis. Stats. The Fire Chief has the day-to-day operational control of the Fire Department and, by implication, possesses those powers necessary to fulfill her/his duties. The Mayor is the titular head of the police and fire departments and can expect the Fire Chief to obey lawful orders of the

Mayor and Common Council. § 62.09, Stats. The Common Council has statutory authority to regulate the City's public services and to act for the government and good order of the City and for the health, safety and welfare of the public. § 62.11(5), Stats. Consequently, the Fire Chief must comply with duly adopted ordinances which are "lawful orders" of the Common Council.

### **Ordinances**

There are several ordinances which are relevant to the question you ask. Sections 6.01(1) and 6.02(1), Madison General Ordinances (MGO), describe the Fire Chief's responsibility for the operation and management of the Fire Department. Section 6.02(1), MGO, sets forth the rule which applies regarding the supervision and management of the Fire Department in the absence of the Fire Chief.<sup>1</sup>

#### **6.01 Who Compose the Fire Department.**

(1) Fire Department. The Fire Department shall be under the supervision of the Fire Chief who shall be responsible for the protection of life and property against fire, the prevention and extinguishment of fires, the removal of fire hazards, and emergency rescue and lifesaving operations. The Fire Chief shall be responsible for the care and maintenance of all property and equipment of his division.

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#### **6.02 Duties.**

(1) The Chief of the Fire Department shall have general supervision of the Fire Department and be responsible for the efficiency thereof. The Assistant Chiefs of the Fire Department shall discharge the duties of the Chief of the Fire Department in case of the absence, disability, or suspension of the Chief.

### **Discussion**

Courts have been called upon to determine the meaning of the term "absent" or "absence" in the context of ordinances or statutes that specify who is authorized to exercise the powers and duties of a particular officer in his or her absence or when s/he is absent. Depending on the duties of the particular office, the nature of the absence, the context in which the absence occurs, and the presence or absence of geographic qualifiers in the statute or ordinance (ex: absent from the state), the term has been interpreted to mean different things: away from the officer's primary place of duty during normal office hours; physical non-presence (within city, state, etc.); or "effective absence" such that the absence effectively debilitates or prevents the officer from exercising the duties of her/his office. 1 *Words and Phrases*, Absent, Absence, pp. 257-259, pocket part 64-65. Courts have thus acknowledged the term's ambiguous nature.

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<sup>1</sup> Section 3.02, MGO, entitled "Continuity of Government" has also been brought to my attention. Section 3.02 MGO, deals, among other things, with procedures for appointing emergency interim officers in the event of a vacancy in office caused by a catastrophic event or attack. Since your questions can be answered with reference to § 6.02 MGO, this opinion need not address whether § 3.02 applies to the office of Fire Chief or Police Chief which are filled by the PFC under § 62.13(4), Stats.

The question often arises in the context of a governor or mayor who is temporarily absent from the jurisdiction. The matter in that context has an additional complexity since there are often issues of constitutional authority at stake. The Wisconsin Attorney General has addressed the issue of the meaning of the term “absence” within the Wisconsin Constitution provision which then declared that “in the event of the absence [of the governor] from the state the powers and duties of the office shall devolve upon the lieutenant governor . . . until the governor . . . shall have returned.” Wisconsin Constitution, Art. V, Section 8.<sup>2</sup> The Attorney General’s analysis of the term takes account of the purpose of the provision and its continuing operation in the modern age:

This section can be read one of two ways. First, ‘absence’ could refer to any physical absence . . . . On the other hand, it can be argued that ‘absence’ refers only to an ‘effective absence,’ i.e., only an absence which prevents the governor from discharging duties which need to be done before his return. The framers of the constitution presumed, as they quite reasonably would in the mid-nineteenth century, that any absence from the state would prevent the governor from discharging the duties of his office. At this point in our history, an absence was a threat to the continued operation of the government. This construction is reinforced by contrasting absence with the other situations giving the lieutenant governor the powers of governor, namely, death, resignation, and inability to perform by reason of mental or physical disease. With the subsequent advent of efficient air travel and instant world-wide telephonic communication, this construction would conclude that the word ‘absence’ will subserve its historical purpose by construing it to mean ‘effective absence,’ i.e., only such an absence as prevents the governor from discharging duties which need to be done before his return. 68 OAG 109 (1979).

The OAG cites the Wisconsin Supreme Court decision in *State ex rel. Olson v. Lahiff*, 144 Wis. 490, 131 N.W. 824 (1911). In that case, the Court construed a municipal ordinance which provided that a common council president had the powers of the mayor during the mayor’s absence from the city. The Court held that the word “absence” as used in the ordinance meant “effective absence,” i.e., absence which renders the mayor unable to perform a duty which should be performed at the time.<sup>3</sup> (This case also implicitly assumes that an “absence from the City” would prevent the mayor from discharging the duties of office, as would have been the case in 1911.)

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<sup>2</sup> Note: The language of the constitutional provision has since been modernized and the section renumbered (Article V, Section 7).

<sup>3</sup> A similar analytical approach to the matter was used by the Kentucky court in a case which analyzed the authority of a common council president to act in the absence of a Mayor:

. . . “absence” . . . means not merely physical absence of the mayor of the city, but such an absence as renders him incapable for the time being of performing the act that may be in question, which act must present such a necessity for immediate attention as to require it to be then executed. *Watkins v. Mooney*, 71 S.W. 622, 624, 114 Ky. 646. *Words and Phrases*, supra p. 259.

In the instant circumstances, the term “absence” as used in § 6.02(1), MGO, contains no geographic qualifiers. It is also linked with the words “disability” or “suspension.” The intent of the ordinance thus appears to be to assure continuity of authority when a Fire Chief is unable to exercise the powers and discharge the duties of the office of Fire Chief due to absence, disability or suspension. Mere “absence” from a location (City or State) is not the triggering event. Consequently, it is my opinion that mere physical absence is insufficient; rather it is an “effective” absence, i.e., one the circumstances of which causes the Chief to be unable or unavailable to perform the duties of Fire Chief that should be performed at the time. This interpretation is consistent with the language of the ordinance. It is also a practical one that recognizes the technological advances in facsimile, telecommunications and internet communication which allow a Chief to be away from the City but effectively present with respect to her ability to discharge her duties.

Two additional observations are appropriate. First, even in these days of rapid transportation and instantaneous telecommunication, a circumstance may arise where immediate exercise of the authority of the Fire Chief is demanded in order to meet an emergency during a temporary absence by the Fire Chief which would normally not be considered an “effective absence” within the meaning of the ordinance.<sup>4</sup> In such a situation, pursuant to § 6.02(1), MGO, the powers and duties of the Fire Chief during the emergency shall be discharged by the Assistant Fire Chiefs. Second, the meaning of “effective absence” as used in this opinion necessarily limits the authority of the Assistant Fire Chiefs to discharge only such duties of the Fire Chief that must be performed during the Fire Chief’s absence. As to the Fire Chief’s other duties which need not be done at that particular time, in effect there is no absence.

Based on the foregoing, it is my opinion that the practice of the Fire Chief summarized above in the introductory paragraph of this opinion comports with the language and purpose of § 6.01(1) and § 6.02(1) of Madison General Ordinances. Nothing in the opinion affects the requirement that the Fire Chief use applicable leave time when taking vacation, sick leave, etc.

/s/ \_\_\_\_\_  
James L. Martin  
City Attorney

JLM:CSH:skm

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<sup>4</sup> Such a situation was described in *Olson v. Lahiff*, supra:

If during the mayor’s absence from the city, even for a brief time, a riot occurs, or an occasion arises which demands immediate exercise of the executive power to preserve order or enforce the laws, the powers and duties of the mayor to meet the emergency must necessarily be vested in the president of the council fully and completely during the period of the absence.