

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

Date: January 14, 2013

MEMORANDUM

TO: Mayor Paul Soglin

FROM: Michael P. May, City Attorney

RE: Legal Considerations Regarding Independent Investigation of Police Officer Involved Shooting Incident

Your office has received several letters or emails, apparently in a standardized form, asking for an “independent investigation” of the recent police officer involved shooting incident in which Madison Police Officer Stephen Heimsness shot Paul Heenan. You asked me for advice on the legal contours that might guide any consideration of such requests by the City. Because these requests are very recent, please consider this as a preliminary analysis. More legal issues may be identified if the City wishes to pursue this.

In the usual situation, where questions of the propriety of a police officer’s actions are raised, the Madison Police Department (MPD) conducts an internal investigation. (If potential criminal conduct is at issue, a parallel criminal investigation is also undertaken by Madison Police detectives if the incident occurred in the City of Madison.) Specific officers are assigned for Professional Standards and Internal Affairs (PS&IA), and these officers regularly conduct numerous such investigations. Allegations of policy violations may cover a wide range of conduct from administrative infractions to use of force concerns and unlawful conduct. The PS&IA officers make recommendations to the Police Chief on discipline of officers. In rare circumstances the Police Chief has himself requested that the investigation (criminal and/or internal) be conducted by an outside entity. If the officer objects to the discipline, the matter may go to the Board of Police and Fire Commissioners, usually called the Police and Fire Commission (PFC).

In this case, because the incident involved a shooting of an unarmed citizen which resulted in the citizen’s death, some members of the community are asking that an independent investigation – outside the normal MPD process – be conducted. As I understand the requests, some are asking that an independent review/investigation be conducted of the recent incident and some are also asking that such an additional oversight mechanism be made a permanent part of City government.

In examining the existing methods of independent investigation and review of police actions, it is important to distinguish between the investigation and determination to

prosecute criminal charges, and the internal MPD investigation and determination to bring misconduct charges. In my review of some of the letters, I was not clear what specific sort of independent review or investigation was being requested.

A. Existing Framework for an Independent Investigation or Review.

1. Police and Fire Commission.

The State of Wisconsin first provided for police and fire commissions at the end of the nineteenth century: in 1885 for Milwaukee, and in 1897 for second and third class cities. Madison has established a Police and Fire Commission (PFC) pursuant to sec. 62.13, Wis. Stats., and sec. 33.06, MGO. That body is independent of the Madison Police Department (MPD) and of the Mayor and Common Council. The PFC has citizen members each of whom serves a 5-year term. Sec. 62.13(5)(b), Wis. Stats., allows the police chief, a member of the PFC, the PFC as a body, or “any aggrieved person” to file a complaint with the PFC, asking that a member of the police department be disciplined, up to and including dismissal.¹ The PFC acts as a quasi-judicial body to conduct a hearing on any such complaint.

Thus, Wisconsin law has a specific procedure for an independent review of police officer actions, with the possibility of resulting discipline. Wisconsin has recognized that a purpose of the PFC is to remove actions regarding police and fire personnel from political pressures. As was noted by the Wisconsin Supreme Court in *State ex rel. Pieritz v. Hartwig*, 201 Wis. 450, 453 (1930):

... it is common knowledge that the legislative act providing for the creation of the fire and police commission was enacted for the purpose of taking the administration of fire and police departments out of city politics, in order that test of fitness for the position of fireman and policeman might be ability to serve the city, rather than ability to advance the political interests of the administration in power. For this purpose a continuing body was created, only one of whose members should retire each year, which was to be composed of representatives of different political parties.

The *only* method in Wisconsin for discipline of a police officer is by the police chief or the PFC.

¹ The phrase “aggrieved person” appears to be more limited than “any citizen.” The statute formerly allowed any “elector” to file a complaint, but this was changed to “aggrieved person.” The exact scope of that phrase is not clear. Compare, for example, the rulings by the Madison PFC that this requires that the complainant have a particularized involvement in the circumstances of the complaint, more than merely a member of the public or an observer, *Lueders v. Riley* (September 30, 1998); *Greer v. Amesqua* (September 30, 1998), with the somewhat more expansive reading by the Wisconsin Supreme Court in analyzing similar language in the statute for the City of Milwaukee, Sec. 62.50, Wis. Stats., *State ex rel. Castaneda v. Welch*, 2007 WI 103, 303 Wis2d 570, 600-601 (Wis. 2007).

Thus, under the authority that exists now in Wisconsin, an aggrieved person could file a complaint with the PFC, triggering a hearing on the actions of Officer Heimsness by the PFC, with the potential for discipline.

The PFC's authority to itself investigate or prosecute charges is less clear. As noted above, the PFC or a PFC member has the statutory authority to file a complaint, logically suggesting that such a decision would be preceded by some type of investigation. However, the PFC, as a quasi-judicial body, is also the body under the statute that would hear any charges against an officer. A question arises as to whether these two apparently conflicting statutory roles -- investigative body and prosecutor to determine if charges are warranted and quasi-judicial decision-maker -- could be fairly reconciled. Such dual roles may raise due process issues that would require a careful separation of investigatory and quasi-judicial roles. Some might perceive such dual roles as compromising the PFC's more usual role as the neutral body that sits in judgment of complaints brought before it. These same issues were noted in a recent memorandum to the Mayor from Scott Herrick, who serves as legal counsel to the PFC.

2. Review By District Attorney, Department of Justice or other Independent Office.

Despite the existence of the PFC, and the Police Chief's authority in the exercise of his discretion to reach out to other agencies in appropriate cases (as was done here with State Department of Justice, Division of Law Enforcement Services, Training and Standards Bureau), these letters appear to ask for something totally different -- some sort of special prosecutor type of position to conduct an investigation. Contrary to some of the statements in the form letters, there *has been* independent review of the incident. The Dane County District Attorney, an elected official, independent of the MPD and the City of Madison, conducted his own review to determine if criminal charges were warranted. This review included requesting additional investigatory forensic information. Generally speaking, those decisions regarding criminal charges are entrusted to the District Attorney or a Grand Jury; any other sort of independent review could not result in criminal charges.²

In addition, MPD Police Chief Noble Wray asked for and obtained an independent review by the State Department of Justice, Division of Law Enforcement Services, Training and Standards Bureau, another entity independent of the City, the MPD and the Dane County District Attorney. The DOJ Training and Standards Bureau is the staff of the Law Enforcement Standards Board. It administers the programs of the Board for certification of law enforcement, jail and secure detention officers, of instructors, and of academies. It also coordinates and supports statewide training provided by the Department of Justice to the Wisconsin law enforcement community. The report of the

² However, under sec. 979.04, Wis. Stats., the District Attorney or the County Coroner or Medical Examiner may petition for an inquest into the death of a person. Thus, the Medical Examiner is another source of independent review in the event of a death. My understanding is that the County Medical Examiner provided reports and findings to the District Attorney in his review of this matter. A Grand Jury inquiry would proceed under sec. 968.40, Wis. Stats.

DOJ was recently released by the MPD. Chief Wray also asked for and obtained a “shadow” of the MPD investigation by a member of the Dane County Sheriff’s office, another independent elected office.

Thus, there has been, at some level, independent review by three independent entities looking at the incident. My understanding is that those calling for a further investigation or review assert that these agencies, closely aligned with law enforcement, cannot conduct a fair review.

3. Special Prosecutor.

Wisconsin law does not contemplate some sort of “special prosecutor” appointed by the City to pursue misconduct charges against police officers. The PFC is the method authorized under Wisconsin law. To the extent these letters to the Mayor’s office want a change in state law, that is a policy issue to be examined in light of the present system and any proposed change.

B. Additional Options for the City.

The requests appear to desire some sort of independent review or investigation or both, but outside the existing methods under Wisconsin law, including the District Attorney, the Department of Justice, the Chief of Police and the PFC. Some cities have positions such as a “police auditor” or a separate review commission, but my quick review of some of them (Eugene and Knoxville, e.g.) showed that these bodies normally end up making a recommendation to the police chief on further action. They do not have authority to discipline an officer or make policy changes.

Cities have adopted a wide range of mechanisms for oversight of law enforcement conduct. One resource for examining the options – which usually include some form of an investigatory office or a civilian oversight board or both – can be found at the website of the National Association of Civilian Oversight of Law Enforcement, www.nacole.org. Civilian oversight was also examined by Professor Richard Jones in *Processing Civilian Complaints: A Study of the Milwaukee Fire and Police Commission*, 77 MARQ. L. REV. 505 (1994). This memorandum will not examine all of the permutations of such oversight bodies -- for example, do such bodies exist when another independent body such as a PFC also exists? -- but simply note that they exist and present a range of possibilities and challenges. Chief Wray or others at the MPD or the State DOJ may be aware of other resources.

Among the options the City could consider are:

(a) establishing some sort of body or person to conduct an independent investigation or review of this specific incident;

(b) establishing such a body on a permanent basis, looking at the range of options used in other cities; or

(c) asking the Police Chief to institute a policy listing the circumstances under which the Police Chief is instructed to use an outside investigator or review.

If the Mayor or Common Council were interested in considering some of these options, our office would need to carefully examine the boundaries between the powers of the Mayor, Common Council and the Chief of Police. This is not always an easy legal question.³ Under sec. 62.09(8)(d), Wis. Stats., the Mayor is the head of the police department; under sec. 62.09(13)(a), Wis. Stats., the police chief has command of the police department “under the direction of the mayor.” The same section provides that the chief is to “obey all lawful written orders of the mayor of common council.” Under sec. 62.11(5), Wis. Stats., the Common Council has the power to act for the health, safety and welfare of the public.

I think it very likely that these statutes allow the Mayor or Council or both to establish some sort of position or body to independently review actions of the police chief or the police department, depending on the powers and authority given to such a body. The competing legal interests presented by possible Mayor or Common Council actions instructing the Police Chief to establish policies regarding outside investigation of such incidents are explored in the City Attorney report on tasers referenced in footnote 3. We would want to be certain that any such independent position or body or policy statement did not invade the statutory authority of the police chief or the PFC.⁴

Assuming the Mayor, either alone or with the concurrence of the Council, could establish such an independent investigator (with or without an independent oversight body), the powers of that person or body would necessarily be limited to investigating and making a report. It could not pursue criminal or civil actions and could not itself change MPD policies. Discipline would remain with the Chief and the PFC.

This is an important point. Absent a change in state law, any oversight body would be limited to the question of the MPD’s internal investigation, and could ultimately do nothing more than investigate, report and recommend.

³ See, for example, the competing statutory authority and policy concerns discussed in the report prepared by the City Attorney in 2005, on a resolution to limit the use of tasers by the MPD, Legistar ID No. 00572, which can be found here:

<http://madison.legistar.com/View.ashx?M=F&ID=1745997&GUID=1DBC4D98-6B39-4A2E-87B1-BAACA37A91DD>

⁴ I understand there is some precedent for this from the early days of the Soglin I administration, involving an outside review of issues surrounding new Police Chief David Couper. While the authority to create such an investigating body was not at issue in the case, the dispute in *Christie v. Lueth*, 265 Wis. 326 (1954) arose out of the recommendations made by a special investigating committee created by the La Crosse Common Council.

Given the limitations of such a new body and the existing mechanisms, whether such an independent review body should be established -- either on an ad hoc basis in this instance, or as a permanent feature of City government -- is a policy question raising a number of issues, including the expertise required to review actions of police officers. I leave those difficult matters to the policymakers to consider. If either the Mayor or Council were interested in pursuing this, I recommend asking the Police Chief, who likely has significant knowledge of the range and most effective types of outside review of police actions, for options or recommendations on how to proceed.

Finally, if the City were to examine the option of some sort of new type of independent review, I raise two important, fundamental questions that must be considered: What does the City want this independent mechanism to do? What will be its mission or purpose? Answers to those questions are critical in determining the nature of the mechanism.

C. Conclusion.

Wisconsin law currently provides a number of methods for independent review of actions of police officers, the most significant being the independent Police and Fire Commission. The District Attorney, Department of Justice and other law enforcement agencies such as the Dane County Sheriff's office could also provide independent review. The Chief of Police could be asked to establish a policy determining when and how an independent review would be requested. If the City wishes to look beyond these existing resources, the City could set up an office or panel for such investigation and review, but that office or panel could only investigate, report, and make recommendations to be considered by others. Almost anything beyond this would require a change in state law.

CC: Chief Noble Wray
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All Alders