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June 26, 2020

Memorandum

To: City Council Members

Cc: Dale Peters, Matt Rokus, Chris Bell, Vicki Seltun

From: Stephen Nick, City Attorney

Council members have asked questions about the policy, hiring, and supervisory authority with respect to protective services and specifically the Police Department. Because this issue is of general application and likely of current interest to all council members I am sharing my response and legal opinions with the entire City Council.

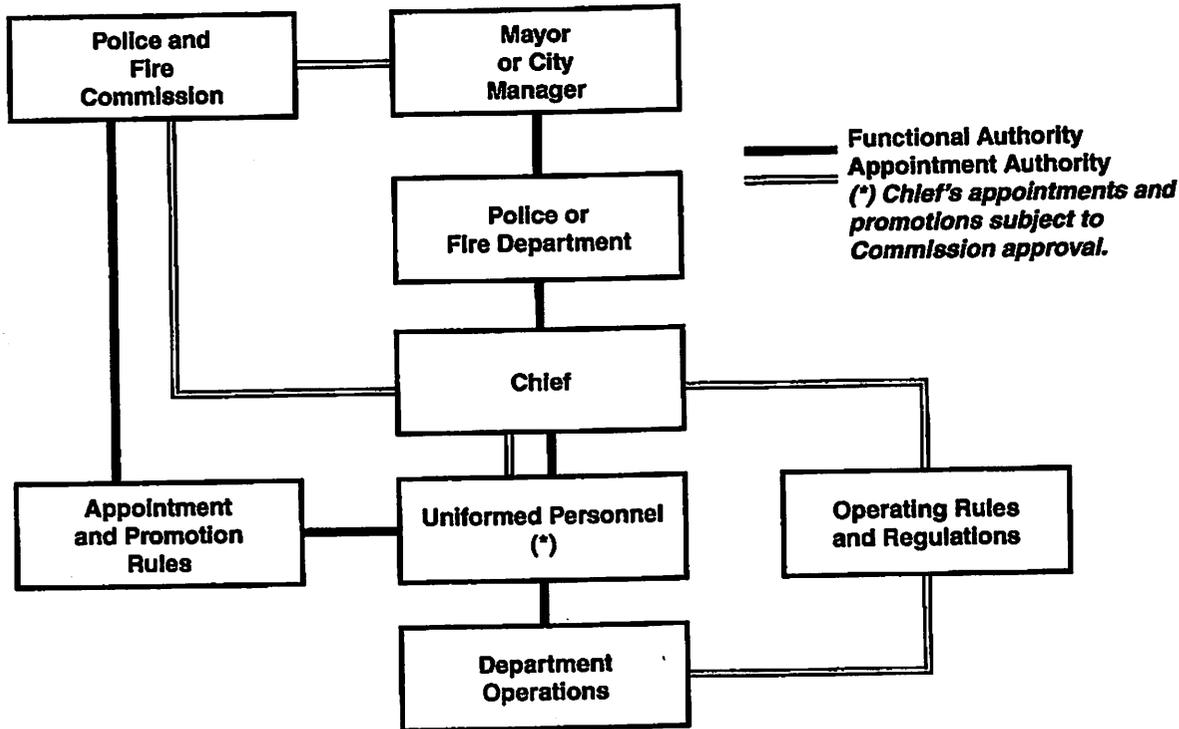
Question / Issue

The question is regarding the relative roles of the Chief along with other participants including the City Manager, City Council, Police and Fire Commission, and Wisconsin Police Professional Association, Local 9, the police union representing many of our sworn officers in the development of law enforcement policies and practices for the Eau Claire Police Department.

Introduction / Overview

The illustration below is of the Lines of Authority in Wisconsin Cities for police and fire departments for Wisconsin cities operating with a full-time professional police and fire department overseen by a chief executive, in our case a city manager, and a police and fire commission with standard statutory authority over appointment, promotion and discipline. *Handbook for Wisconsin Police and Fire Commissioners*, League of Wisconsin Municipalities (Dec, 2019). From this diagram you can see that the city manager has responsibility for the department as she or he does over all departments of the city through the operational control of the chief. Functional authority, which includes operational rules, regulations, policies, and procedures are established by the chief and implemented through the officers and other department personnel. Police and fire commissions (PFC) have appointment authority and the related authority to promote and discipline, but the PFC role does not extend to operations. While not included in this diagram, city council also has a role related to its budgetary authority and, in the city manager plan form of local government, a further role in the selection and removal responsibility of the city manager.

Figure 1. Lines of Authority in Wisconsin Cities
 (Police and Fire Commission does not exercise optional powers.)



City Manager

The League's PFC Handbook indicates "in cities operating under the council-manger form of government, the city manager is the chief executive officer and head of the police and fire departments." As most cities are mayoral the law states it this way, the "mayor shall be the head of the fire and police department, and where there is no police and fire commission shall appoint all police officers." s. 62.09 (8)(d), Wis. Stats. When cities elect the manager plan under Chapter 64, the city manager accepts these responsibilities as the "city manager shall be the chief executive officer of the city and head of city administration and shall possess and exercise all the executive and general administrative powers imposed and conferred by the general law or special charter upon the mayor and common council and upon the various boards, commissions and officers..., and such additional powers as are herein imposed and conferred. s. 64.11 (1), Wis. Stats. Some additional powers relevant to this discussion include authority to appoint minor offices and positions, appoint department heads, all appointments "must be purely on merit", and appointment authority is "not to be construed as depriving the board of police and fire commissioners or the chiefs of fire or police departments of any city of all powers conferred s. 62.13 and s. 64.11 (2)-(5). Since Eau Claire is a large enough city to require a PFC, the manager does not appoint or hire the chief or officers, that is the responsibility of the PFC. However, the manager retains other executive authority. As the chief executive, the city manager "sets policies, makes executive decisions, appoints, removes, and directs the work of agency heads." *Handbook for Wisconsin Police and Fire Commissioners* (Dec, 2019). The police and fire departments and the chiefs as department or agency heads are subject to the executive leadership direction of the city manager.

Chief of Police

Police chiefs, along with the mayor (city manager), treasurer (finance director), city clerk, and city attorney are officers of the city and do enjoy and bear the responsibilities of direct statutory authority. s. 62.09, Wis. Stats. "The chief of police shall have command of the police force of the city..., under direction of the mayor (city manager)." s. 62.09 (13), Wis. Stats. (parenthetical added). Further, the chief "shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law". Id. The chief's daily executive functions are also conferred through Eau Claire City Code, which provides in relevant part that "the police department shall be under the supervision of the police chief who shall be the commanding officer of the police force and responsible for the enforcement of law and order." s. 2.36.070, Code of Ordinances of the City of Eau Claire. However, the authority as one would expect is not unbounded and includes an express qualifier that "the chief shall obey all lawful written orders of the mayor (city manager) or common council." Id. There is no further definition or explanation of the scope of such "lawful orders" but it would include the above executive authority of the mayor or in our city's case the city manager as well as, what will be discussed further below, the budgetary and other legislative authority of the city council. The police and fire chiefs and departments are also subject to the apolitical appointment authority of the police and fire commission.

Police and Fire Commission (PFC)

Police and fire commissions were a product of the progressive era and are intended to provide citizen oversight, keep politics out of policing and assure that hiring is done on merit. The statutory responsibilities of the PFC are significant and fall largely in the category of personnel functions as a merit-based civil service alternative to personnel decisions that previously were the mayor's responsibility or subject to political influence from the mayor's office through the chief prior to this reform. While political influence is a form of citizen input and oversight, the PFC affords direct citizen input into hiring, promotion, and disciplinary functions in a manner that provides officers notice, review and impartial decision-making, all concepts of due process fairness. The authorities of the PFC as listed by *Handbook for Wisconsin Police and Fire Commissioners* (Dec, 2019) are as follows:

- Appoint, suspend or remove the chief of police or fire
- Approve all appointments made by the chiefs
- Approve and control competitive examinations used to judge suitability for appointment of subordinates
- Approve each list of individuals determined to be eligible for appointment
- Suspend a police or fire chief or subordinate pending the filing and hearing of charges against them
- Initiate charges against a chief or any subordinate (since the PFC also hears the case as a quasi-judicial decision-making board this should be avoided to ensure due process)
- Hear charges filed against a chief or a subordinate, make findings and determinations, and impose penalties
- Hear appeals of disciplinary actions initiated by one of the chiefs against any subordinate

The unifying theme of the PFC's authority is personnel decisions. Informed by a policy preference that, much like the policy behind the Council-Manager form of government, hiring and any necessary discipline or discharge should be merit based and apolitical to further honest and effective local government focused on serving the entire community. This policy preference moved cities away from what had been a patronage system, all too often associated with graft, and generally poor and inequitable public service experiences in many U.S. cities prior to these reforms. "The legislature's primary purpose in creating PFC's was to 'remove the administration of fire and police departments from city politics and to place it in the hands of impartial and nonpolitical citizen boards.'" *Handbook for Wisconsin Police and Fire Commissioners* (Dec, 2019) (internal citation to a 1930 WI Supreme Court decision omitted). As noted in the City's

standards for appointment to the PFC, it is an apolitical body and appointees to it should be apolitical; however, the minimum standard is that no appointment can be made which results in more than three members of the PFC belonging to the same political party.” S. 62.12(1). The League also opines that as a “citizen” board although the law does not definitively prohibit council or other elected members of governing bodies, public officials, or employees from serving on the PFC, it “may not be the best policy given that the PFC’s primary purpose is to insulate the police and fire departments from politics.” *Handbook for Wisconsin Police and Fire Commissioners* (Dec. 2019). Finally, while cities can sometimes modify statutory provisions under home rule authority, the PFC is mandatory under Wisconsin law for cities of at least 4,000 population and those cities “cannot vary from the statutory provisions.” *Id.*

But it wouldn’t be a legal opinion if there wasn’t an exception to the rule just cited. While cities cannot legislatively vary from the statewide police and fire commission minimum standards and scope of authority cited above, there is a means for popular expansion of PFC authority through referendum. What are termed as “optional powers” include certain administrative and policy authority otherwise held by the mayor or city manager; such as: organize and supervise the fire and police departments and prescribe such rules and regulations for the control and management; contract for the purchase of necessary equipment and supplies; and audit all bills and expenses before they are paid by city finance. s. 62.13 (6). To invoke the “optional powers” provision contained in s. 62.13 (6) requires a petition signed by at least 20 percent of those in the city that cast a ballot for governor in the last general election filed at least 70 days prior to a regular city election, and then if meeting all statutory requirements for placement on a ballot, the proposition is put to the electors. It requires a majority vote on the referendum to pass. If adopted it would require a future referendum to remove optional powers and return to the typical PFC personnel authority discussed above. Few Wisconsin cities have elected to adopt the broader PFC optional powers, including to my knowledge West Allis and, I believe, Milwaukee. The optional powers section informs not only what is possible through referendum for broader citizen board managerial oversight of the fire and police departments but also by exclusion what is clearly beyond the scope of those PFC’s, including presently the Eau Claire PFC, organized under the default and much more widely utilized provisions of Wisconsin law. While a policy choice for the community through referendum, altering from the current professional supervision and leadership of police and fire departments would have to be carefully weighed.

Police Union

Police officers and firefighters are public safety employees with whom the City has an obligation under the Municipal Employment Relations Act (MERA) to meet and confer in good faith with the intention of reaching a collective bargaining agreement (CBA) covering issues related to wages, hours, and conditions of employment. s. 111.70, Wis. Stats. Our employees have the right to form and join labor organizations to collectively bargain with the City on these issues, our police officers have long elected to do so, and we have a current CBA contract with the Eau Claire Professional Police Association, Local 9. The current CBA was recently discussed, updated and approved by both parties, for the City approved by the City Council, and is valid through December 31, 2021. While the CBA cannot and does not alter the statutory authority noted above of the City Manager, Chief or PFC, it does inform how some of that authority may be exercised as it intersects with the mandatory subjects of bargaining noted above of wages, hours, and working conditions. It is beyond the scope of this memorandum to cover the entirety of the CBA, but it is a public document and can be reviewed by anyone requesting a copy or made available online. Of particular relevance to this discussion of managerial and policy oversight, Article 2 of the CBA is termed the “Management Rights Clause” and it generally reserves to the City the right to operate and manage the affairs of the department in accord with its powers and authorities in all respects unless specifically abridged, delegated, or modified by the agreement. And it expressly states that such retained authority by management (the Chief and City Manager) includes:

- Determination of agency mission, standards of service and operational control
- Establishment of policies, rules, regulations, and procedures
- Disciplinary action, not contrary to other provisions in this agreement
- Relieve employees from duty for lack of work or lack of funds or other legitimate reasons
- Create new positions or divisions
- Introduce new or improved operations or work practices
- Determine the length of time required for qualification at new or vacant positions
- Control of the department's budget
- Take whatever actions are necessary in times of emergency or in the interest of public safety
- Hire, schedule, promote, transfer, assign, train, or retrain employees in positions within the department

While this is a broad retention of necessary statutory authority to operate and oversee the department there are many specifics within the CBA that do modify or remove some authority. The titles of the various articles of the CBA provide a general understanding of what those areas are, such as:

- Wages and Salaries
- Hours of Work
- Overtime / Premium Pay
- Holidays
- Vacations
- Pension
- Insurance
- Leaves
- Uniforms
- Seniority
- No Strike Agreement / No Lockout
- Grievance Procedure
- Rules and Regulations
- Bill of Rights
- Internal Affairs Interview Procedure

I'll comment further on the last several that, to summarize, provide officers a fair and known set of procedural rights and hopefully assists us to address disputes of contract interpretation or application in a productive manner. The grievance procedure provides for a number of internal steps to review matters of disagreement about contract application or enforcement, which if not resolved at one of those four steps can be brought before an arbitrator with the Wisconsin Employment Relations Commission. However, no matter over which the police and fire commission exercises jurisdiction, in other words, hiring, promotion, or discipline, is subject to the grievance or grievance arbitration procedures of the CBA. Article 17 -Rules and Regulations- provides that the Chief or designee shall provide employees with both the Rules and Regulations of the Eau Claire Police Department and post standard operating procedures and explain the same to membership. Annual training is provided the City, police supervisors, City legal and risk management members, and various outside experts and persons with relevant expertise or experience to officers annually to meet both local and state certification requirements. Article 18 Bill of Rights guarantees officers certain procedural rights, expressly notice of the right to representation by the Association (referring to Local 9) prior to any interview investigating misconduct including possible criminal charges. And finally, Article 19 Internal Affairs Interview

Procedures, reinforces the obligation of the City to comply with statutory provisions regarding the use of polygraph or other honesty testing devices.

Changes in practices, policies or procedures may implicate the collective bargaining agreement or invoke the statutory obligation to meet and confer with our represented employees. Changes should be reviewed with the human resource and city attorney departments before finalization or implementation to determine whether the CBA is implicated and must or should be collectively bargained. It is further advisable that the City through the executive responsibility of the Chief continue its practice to discuss such matters with Local 9 leadership prior to implementation. However, the City in most instances retains statutory and local authority to make, revise, and implement law enforcement policy and procedures, while the PFC has authority to hire, promote, and as warranted discipline officers, and the City Council has the legislative authority to set budgets and adopt such ordinances of general application to best serve the community.

City Council

The City Council role in setting community expectations for the police department is not expressly covered in the League's Lines of Authority in Wisconsin Cities diagram included above. Primarily because its role is not direct but instead, like its legislative role with other departments, is indirect yet overarching. The legislative branch through the council is vested with the awesome authority 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." s. 62.11 (5), Wis. Stats. The last phrase of that authorization is, appropriate to our current discussion, known as the "Police Powers Clause" the power and obligation to act for the health, safety, and welfare of the public. It is a broad grant of authority to act in the public interest as found by the city council, subject to the introductory language to this section of law "except as elsewhere in the statutes specifically provided." Id. Key exceptions as relevant to the topic of this memo have been cited above. Another qualification on the broad authority is how it may be implemented. Whereas executive authority is utilized in the day to day execution of the duties of government, local legislative authority of the city council "may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means." Legislative means of directing policy, when not in conflict with other statutes, are through regulation of general application (resolutions and ordinances) and the power of the purse, budgetary allocations and the tax levy (again it must be noted, within the bounds of other specific statutes). Still even within the outer parameters of statutory levy limits and expenditure restraint programs there is wide legislative discretion to set and amend budgets of the city. While the City Manager must submit the budget, it is the City Council that has sole responsibility, following public hearing and input, to adopt the budget and make any amendments. s. 65.90, Wis. Stats. The city manager and department heads including the chiefs have broad discretion on how and when to expend funds but the amount allocated is a legislative decision for City Council. It is indirect and imprecise, but the ultimate legislative policy choice is how to assign limited financial resources.

Another point of input into policy and its execution for city council in a city manager plan form of local government is through the selection of a city manager. Unlike an elected political mayor in the mayoral system, in the city manager plan, which Eau Claire has elected by charter ordinance, the council selects the manager. "The city manager shall be elected purely on merit... the council shall give due regard to training, experience, executive and administrative ability, and efficiency and general qualifications and fitness for performing the duties of the office... no weight or consideration shall be given by the council to nationality, political, or religious affiliations or to any other considerations except merit and direct qualifications for the office." s. 64.09 (2), Wis. Stats. Bounded by the same apolitical aspirations and intent for local good government as the PFC, the standards are reviewed and applied by the city council in their legislative discretion. Seeking a candidate for city manager, as City Council is now engaged in, that is qualified as required above

and also committed to furthering the City's mission and strategic plan objectives is the responsibility and prerogative of City Council. Once in office it becomes the manger's responsibility along with the chief to direct the department, but city councils in our form of local government properly exercise legislative direction in its selection of the city manager.

Finally, the City Council can adopt ordinances of general application within its scope of local authority. Many of the laws and regulations that law enforcement officers are sworn to uphold are statutory, but others are ordinances of local adoption and subject to local amendment by the City Council. For example, the City Council recently adopted an excessive intoxication ordinance and passed an amendment that lowered the forfeiture for possession of small amounts of marijuana. The scope of ordinances or resolutions is constrained by other statutes, but many actions taken to further public health, safety and welfare are permissible under police powers or home rule. Finally, consistent with the basic but critical separation of powers concepts integral to our democracy, any council actions must remain legislative in nature and not assume for itself executive functions. The legislative branch adopts the laws and the executive often through police, enforces only such laws as the legislature deems in the public interest to adopt. The city manager is responsible for execution of legislative acts of general scope through specific application of time manner and place. Neither the executive nor the legislative branch should attempt to both adopt and enforce the laws. It is critical that each perform its own roles, with the judiciary reserved for review and fair just application of those laws for all.

Summary

The significance and scope of the question is substantial. I know I have taken some length in response but it still remains a relatively short summary of a large policy and legal dialogue it is healthy for us and our community to engage in. Each of the positions or institutions discussed above are in place to collectively further the best interests of all our residents in the hope and expectation that they are safe and secure in both their person and personal liberties. Please continue to know that I am available for any questions or further discussion of the matters raised in this memorandum.



Stephen Nick, City Attorney