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MEMORANDUM

TO: Alder Workgroup to Develop Logistics & Operational Details for MPD Independent Civilian Oversight

FROM: City Attorney Michael Haas

DATE: July 13, 2020

RE: Subpoena Authority of Independent Monitor and Civilian Oversight Board

Overview

The Workgroup has reviewed and discussed ordinance language to provide the Independent Police Monitor and Civilian Oversight Board the authority to issue subpoenas to accomplish their duties and responsibilities. This memorandum outlines relevant law regarding the authority to issue subpoenas and cites several issues for the Workgroup and Council to be aware of and which may arise in the exercise of that authority.

In short, our office has concluded that the Monitor may lawfully exercise the power to issue subpoenas, at least in the course of conducting activities unrelated to investigations and personnel matters. While unclear under Wisconsin law, we cannot guarantee that a subpoena issued by the Monitor related to an investigation or case that may ultimately result in a disciplinary decision would be considered enforceable. We have also concluded that it would be possible to grant the Civilian Oversight Board subpoena authority to take testimony, although the current proposed ordinance does not do so, and any exercise of that authority may also be subject to restrictions in the context of investigations or potential discipline.

Discussion

A. Independent Monitor

In Wisconsin, the authority to issue subpoenas is created under sections 805.07 and 885.01 of the Wisconsin Statutes. Section 805.07 states:

> (1) Subpoenas shall be issued and served in accordance with ch. 885. A subpoena may also be issued by any attorney of record in a civil action or special proceeding to compel attendance of witnesses for deposition, hearing or trial in the action or special proceeding.

The second sentence of this provision applies only to court actions – "civil actions or special proceedings" in which an attorney of record is authorized to issue a subpoena.[1] Because the Monitor and Oversight Board would not serve as an attorney of record in a court action, this sentence does not apply and only the first sentence is relevant, requiring that subpoenas be issued and served in accordance with Chapter 885 of the Statutes.

As to the Independent Monitor, the relevant provision of Section 885.01 states as follows:

> **885.01 Subpoenas, who may issue.** The subpoena need not be sealed, and may be signed and issued as follows:
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> . . . . .
>
> (4) *By any* arbitrator, coroner, medical examiner, board, commission, commissioner, examiner, committee or *other person authorized to take testimony,* or by the member of a board, commission, authority or committee which is authorized to take testimony, within their jurisdictions, to require the attendance of witnesses, and their production of documentary evidence before them, respectively, *in any manner, proceeding or examination authorized by law*; and likewise by the secretary of revenue and by any agent of the department of agriculture, trade and consumer protection.

These provisions grant officials, other than attorneys and court officials in court actions the authority to issue subpoenas. A subpoena may be issued by any "other person authorized to take testimony" when done "in any manner, proceeding, or examination authorized by law."

In at least two instances, Madison General Ordinances grant individuals the power to issue subpoenas. The arbitrator in a grievance matter for general municipal employees has the authority to issue subpoenas at the request of the parties. MGO § 3.53(9)(e)(2). The Rent Abatement Hearing Examiner is granted the authority to issue subpoenas pursuant to Wis. Stat. § 885.01. MGO § 32.04(4)(e)(2)(b). In both cases the official granted subpoena authority does so in the context of a hearing where sworn testimony is solicited.

The Council could attempt to grant the Monitor authority to issue subpoenas to obtain sworn testimony or documents. It is unclear whether, if such a subpoena were challenged, a court would find that it was enforceable, for several reasons. While an ordinance could, on its face, grant authority to take testimony, as required by Wis. Stat. § 885.01(4), the Monitor's

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1 Wis. Stat. § 801.01 states that "Proceedings in the courts are divided into actions and special proceedings." The blanket authority for attorneys to issue subpoenas under § 805.07, therefore, does not appear to apply to matters in which no court action has been initiated, and separate legal authority must be granted.

specific use of that authority would need to be evaluated to determine whether it was "in any manner, proceeding or examination authorized by law."

The proposed ordinance establishes a number of powers and duties which might involve the issuance of a subpoena, including the following:

1) Monitor compliance with MPD policies, laws and orders including recommendations of the Ad Hoc Committee's Report and the OIR Report.

2) Monitor MPD audits of activities, including use of force and personnel investigations, "referring cases back for additional investigation when necessary and recommending findings."

3) Undertake independent investigations of personnel in response to external or internal complaints.

4) Make recommendations to the Police Chief regarding programs, activities, investigations and use of force, including possible discipline.

5) Make referrals to the Police and Fire Commission for disciplinary action.

6) Determine whether complaints have arguable merit when deciding whether to appoint outside counsel to represent complainants.

7) Review and investigate command staff complaints and determine whether they warrant appointment of an outside investigator.

8) Assist in the Oversight Board's annual review of the Police Chief.

9) Make various public reports.

The Ad Hoc Committee's Report did not limit or specify the duties that would be appropriate to involve the exercise of subpoena authority. In theory, the Monitor could issue subpoenas when monitoring MPD compliance with policies and laws, developing recommendations to the Police Chief regarding programs and activities, or drafting and issuing public reports. For those activities, the legal question is whether they constitute a "manner, proceeding or examination authorized by law." The duties would certainly be authorized by local ordinance and there does not appear to be a countervailing legal authority which would restrict the issuance of subpoenas in those instances.

As discussed in previous meetings of the Workgroup, there are additional legal considerations when subpoena authority might be used for personnel-related issues or matters. The proposed ordinance authorizes the Monitor to issue subpoenas when monitoring investigations, undertaking investigations of Department personnel, making recommendations to the Police Chief or the PFC regarding possible disciplinary actions, determining whether a complaint has arguable merit which warrants outside counsel to represent a complainant, investigating command staff complaints, and assisting in the Oversight Board's annual review of the Chief.

All of these actions are only advisory and do not usurp the Police Chief's or PFC's authority to make disciplinary decisions. But they appear to be different than a hearing officer or examiner taking testimony as part of a quasi-judicial proceeding which have been authorized to issue subpoenas in other ordinances. There is a possibility that the Monitor's involvement in a personnel investigation or grievance hearing, and specifically the issuance of a subpoena to obtain testimony or evidence other than that obtained by MPD's Professional Standards and Internal Affairs (PS&IA) or the PFC, could be challenged as an improper intrusion into the disciplinary process that is enshrined in state law and court decisions. In other words, the subpoena authority would need to be exercised consistent with other relevant laws.

The discipline of sworn officers of Wisconsin law enforcement agencies is governed by Wis. Stat. § 62.13, which specifies that an officer cannot be suspended, reduced in rank or dismissed unless there is finding of just cause by the Chief or PFC. The just cause standards include procedural requirements, such the Chief, before filing any charges, making a reasonable effort to discover whether the officer violated a rule or order, as well as the Chief discovering substantial evidence that the officer violated a rule or order.

If the Monitor issues a subpoena for a matter in which PS&IA has not initiated an investigation, it may be there is no conflict with the subpoena and other applicable laws. But if the Monitor inserts themselves into a disciplinary investigation being conducted by the Chief or PS&IA, or that could lead to a disciplinary decision, it is possible that the officer being investigated may not only challenge the validity of any subpoena issued by the Monitor, but may also allege that the disciplinary process has been influenced or affected by an outside actor that is not part of the statutory just cause process. An officer may file a grievance alleging that they have been subjected to two separate investigations.

Whether or not such arguments would be successful cannot be known as the actions of an Independent Monitor in Wisconsin have not been tested or evaluated by any court decisions, and City employees are already compelled to cooperate with an investigation. But it is an issue that may warrant attention both in creating the applicable ordinances and in the Monitor's eventual implementation of the subpoena authority.

Given these considerations, the recommendation of our Office is that the Workgroup give careful consideration to the language in the proposed ordinance related to the Monitor's subpoena authority. One approach could involve more specifically describing the circumstances under which the Monitor is authorized to issue subpoenas, in order to provide the clearest legal authority and definition of "any manner, proceeding or examination authorized by law," as contemplated by Wis. Stat. § 885.01(4). Another approach could be to retain the language in the current proposed ordinance that the Monitor could issue subpoenas "to the extent permitted by law." In the latter case, the development of the Monitor's subpoena authority, and any potential challenges to it, would be left to the judgment and experience of the Monitor.

We can certainly revisit this issue as the proposed ordinance is developed and finalized, but we wanted to highlight these potential legal and enforcement issues related to the subpoena authority of the Monitor.

B. Oversight Board

The proposed ordinance under consideration does not grant subpoena authority to the Civilian Oversight Board. To fully address issues related to potential subpoena authority for the Board, however, we have reviewed the relevant law in that context as well. There is a slightly different emphasis in the statutory language related to the authority of Council committees and boards. Again, Wis. Stat. § 885.01 states:

> **885.01 Subpoenas, who may issue.** The subpoena need not be sealed, and may be signed and issued as follows:
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> . . . . .
>
> (3) *By the chairperson of any committee of any* county board, town board, *common council* or village board *to investigate the affairs of the* county, town, *city* or village, *or the official conduct or affairs of any officer thereof.*
>
> (4) *By any* arbitrator, coroner, medical examiner, *board*, commission, commissioner, examiner, committee or other person authorized to take testimony*, or by the member of a board*, commission, authority or committee *which is authorized to take testimony, within their jurisdictions*, to require the attendance of witnesses, and their production of documentary evidence before them, respectively, *in any manner, proceeding or examination authorized by law*; and likewise by the secretary of revenue and by any agent of the department of agriculture, trade and consumer protection.

Therefore, under § 885.01(3), the chairperson of any committee of the Common Council may issue a subpoena to investigate municipal affairs or the official conduct or affairs of any municipal officer. Under § 885.01(4), any board or other person authorized to take testimony, or a member of a board which is authorized to take testimony, can issue a subpoena in any manner, proceeding or examination authorized by law.

In 1974, the U.S. District Court for the Eastern District of Wisconsin published two cases which held that a municipal committee has the capacity to issue subpoenas to compel witness testimony. In *Dahlinger v. Town Board of Delavan*, a town board asserted it did not have subpoena power to compel witnesses who allegedly could have proven a police chief's innocence at a misconduct hearing. 381 F. Supp. 474, 477 (E.D. Wis. 1974). Applying Wisconsin law, the district court held that subsection 885.01(3) of the Wisconsin Statutes indicated otherwise. *Id.* In *Jenner v. Board of Trustees of the Village of East Troy*, a police chief argued that the village board did not possess subpoena power at a pre-termination hearing, but the district court, citing Wis. Stat. § 885.01(3), again refuted the proposition. 389 F. Supp. 430, 431 (E.D. Wis. 1974). Both of these cases involved quasi-judicial hearings in which the governing body was considering whether to terminate the police chief.

Outside of the context of court cases or proceedings, State statutes and administrative rules grant specific authority to various bodies to issue subpoenas. For instance, during the appeal procedures for persons applying for vocational rehabilitation services from the

Department of Workforce Development, a hearing officer conducting a prehearing conference with the parties "may… use the power of subpoena under s. 885.01, Stats." Wis. Admin. Code § DWD 75.13. Similarly, the Credit Union Review Board is provided with "the powers granted by s. 885.01(4), 1973 Stats" for issuing subpoenas. Wis. Admin. Code § DFI-CU 56.07.

Madison General Ordinances also grant various City boards, committees and commissions, or the head of such bodies, the authority to issue subpoenas, including the Equal Opportunities Commission (MGO § 39.03(10)(b)(8)); the Early Childhood Care and Education Committee (MGO § 3.12(10)(c)(3)(e)(v)); the Ethics Board and the Common Council Executive Committee (MGO § 3.35(12)(b)); the Chair of the Landlord and Tenant Issues Committee (MGO § 32.18(6)(d)); the Small Business Enterprises Appeals Committee (MGO § 33.54(5)); the Affirmative Action Commission (MGO § 39.02(9)(g)(7)); and the Chair of the Common Council Executive Committee when acting as the chair of the Administrative Review Board for the review of administrative determinations (MGO § 9.49(6)(b)(2)).

Finally, according to the League of Wisconsin Municipalities, committees appointed by the Common Council to investigate and make recommendations have the power to subpoena witnesses under Wisconsin Statute section 885.01, even if all of committee members are not aldermen. *Governing Bodies: General FAQ 1*, League of Wisconsin Municipalities http://www.lwm-info.org/945/Governing-Bodies-General-FAQ-1. Chapter six of the Wisconsin League of Municipalities manual states that Wisconsin Statute § 885.01(3) should be understood as its plain meaning which confers on the chairperson of a committee or the Common Council the power to issue subpoenas.

The language of Wis. Stat. § 885.01(3) and (4) appear to provide statutory authority for the Oversight Board, or the Board President, to issue a subpoena when 1) it is investigating the official conduct or affairs of a municipal officer or 2) when authorized to take testimony in any manner, proceeding or examination. The Ad Hoc Committee did not recommend that the Oversight Board conduct investigations or take testimony in a hearing, however, and the current draft of the ordinance does not grant subpoena authority to the Oversight Board.

Conclusion

Based upon the above analysis, it is the opinion of our Office that the Council may enact an ordinance providing subpoena authority to the Independent Monitor. Where there is no contrary statutory provision or contractual right, we would expect such subpoenas to be enforceable. It is less clear that a subpoena issued in the course of an investigation, or in a case which could lead to a disciplinary decision by the Police Chief or PFC, would be held to be enforceable if challenged. The Workgroup and Council may determine whether the more advisable policy approach is to specifically direct the Monitor's actions by identifying the situations in which a subpoena may be issued, or to use more general language and leave the resolution of any potential legal issues to experience and future developments.

Finally, it appears that the Civilian Oversight Board could be authorized to issue subpoenas if its role also included taking testimony, but also subject to similar considerations as the Monitor related to personnel investigations.

We are available to discuss these issues for any Alders who have questions.