

# Oversight of Municipal Police Departments in Wisconsin

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Calls for reform of policing in the United States have gained serious momentum following multiple high-profile incidents where police use of force has resulted in deaths of people of color for what often appear to be relatively minor offenses. Police departments in the United States are largely created and managed by local governments. Although many local governments have historically given police departments wide discretion in how to carry out public safety responsibilities, local leaders are facing increasing pressure to scrutinize police department operations.<sup>1</sup> Municipal leaders are being asked to reassess the effectiveness of traditional policing, assume responsibility for use of force policies, increase department accountability, provide civilian oversight of departments, and provide direction regarding departmental priorities and strategies. These issues are not new but have been brought to the forefront of public concern by recent tragic incidents, and the ensuing nationwide protests and calls for change.

To assess ability to engage in reforms, municipal officials must understand how Wisconsin police departments fit within a municipality's organizational structure. This legal comment provides a brief overview of the statutes governing police departments in Wisconsin. These statutes are not detailed but do provide insight into the authority Wisconsin municipal officials have to manage municipal police departments.

Various persons or bodies share responsibility and authority for oversight of Wisconsin police departments: The chief executive (mayor or manager or

village board); the police chief; the police and fire commission if statutorily required or, if not statutorily required, something that approximates the police and fire commission for disciplinary purposes; and the governing body (common council or village board). It's helpful to examine the statutes governing each in turn.

## Chief Executive Officer

In Wisconsin cities, the mayor is the chief executive officer and is tasked with taking care that city ordinances and state laws are observed and enforced and that all city officers and employees discharge their duties.<sup>2</sup> By statute, the mayor is designated the head of the police department in all cities except those where electors have given the police and fire commission (discussed below) optional powers through a referendum under sec. 62.13(6). Where there is no board of police and fire commissioners, the mayor shall appoint all police officers, and the mayor may, in any city, appoint security personnel to serve without pay, and in case of riot or other emergency, appoint as many special police officers as may be necessary.<sup>3</sup>

In cities and villages operating under the manager form of government,<sup>4</sup> the manager is the chief executive officer and head of administration and possesses and exercises all the executive and general administrative powers imposed and conferred by general law or special charter upon the mayor and common council.<sup>5</sup> Although § 64.11(3) empowers the manager to appoint all department heads, all subordinate officials, and all employees and to remove such appointees

at any time their services or the conduct of their offices becomes unsatisfactory to the manager, 64.11(3) is not construed to deprive a police and fire commission or the police chief of all the powers conferred by § 62.13.

In villages, there is no chief executive officer. Authority is shared by the village board.

## Police Chief<sup>6</sup>

In cities with a police and fire commission (PFC),<sup>7</sup> the police chief is appointed by the PFC and holds office during "good behavior," subject to suspension or termination by the PFC for cause.<sup>8</sup> The police chief has command of the police force, *under the direction of the mayor*<sup>9</sup> and "shall obey all lawful written orders of the mayor or common council<sup>10</sup>...." Each person in charge of a law enforcement agency must "prepare in writing and make available for public scrutiny" a policy or standard regulating law enforcement officers' use of force in performing their duties as well as a specific procedure for processing and resolving complaints regarding the conduct of a law enforcement officer employed by the agency.<sup>11</sup>

## Common Council and Village Board

In Wisconsin, the legislature has granted municipal governing bodies broad home rule authority giving common councils and village boards, except as elsewhere in the statutes specifically provided, control over, among other things, municipal finances and the power to act for the government and good order of the municipality, for its commercial benefit,

and for the health, safety, and welfare of the public.<sup>12</sup> Municipalities also have constitutional home rule authority which empowers them to enact charter ordinances determining “local affairs and government,” subject to uniform laws enacted by the state legislature.

While municipal governing bodies have great latitude to shape and guide police departments and set priorities through legislation and funding, their authority is also limited in important ways. Most notably, governing bodies cannot exercise powers reserved to the police and fire commission.

## Police and Fire Commission (PFC)

More than a century ago, the Wisconsin legislature enacted the statute providing for the use of PFCs<sup>13</sup> in Wisconsin. The legislature’s primary purpose in creating PFCs 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.”<sup>14</sup> Before PFCs were created, appointments to departments were often a form of political patronage. In requiring PFCs, the legislature intended to have the test of fitness for those serving in police and fire departments be the ability to serve the municipality rather than the ability to advance the political interests of the administration in power.<sup>15</sup>

As a body designed to professionalize police departments and insulate them from politics, the PFC plays a unique role. It is essentially a civil service body with exclusive jurisdiction over hiring,

promotions, and discipline<sup>16</sup> of police officers, firefighters, and department chiefs. Whether a municipality is required to have a PFC depends on a population threshold. Municipalities coming within the threshold cannot vary from the statutory provisions. This is because the statutes governing PFCs in cities and villages are to be construed as “an enactment of statewide concern for the purpose of providing a uniform regulation of police, fire, and combined protective services departments.”<sup>17</sup>

Importantly, municipalities that are not statutorily required to have a PFC cannot discipline<sup>18</sup> a police chief or law enforcement officer without first setting up an impartial committee or appointing an impartial person to act in place of a PFC.<sup>19</sup> Any persons so appointed cannot be elected or appointed officials or municipal employees.<sup>20</sup>

Some PFCs have additional authority referred to as “optional” powers.<sup>21</sup> Such powers can only be granted by electors at referendum. Once granted, they can only be revoked by electors at a subsequent referendum. Optional powers give the PFC the following additional powers:

1. To organize and supervise the police department and prescribe rules and regulations for the department’s control and management.
2. To contract for and purchase all necessary apparatus and supplies for the use of the department, exclusive of the erection and control of the police station.

3. To audit all department bills, claims and expenses before they are paid by the municipal treasurer.

## How Do the Various Parts Go Together?

Because various persons or bodies share responsibility and authority for oversight of Wisconsin police departments, there may at times be disagreement regarding who ultimately has authority with respect to a particular matter.

Generally speaking, the governing body has wide latitude to enact legislation governing the police department and to exercise budgetary control over the department but should be cautious in legislating on technical matters where law enforcement has special expertise or training without understanding the effect of any laws on the department. Additionally, some matters may be beyond the purview of the governing body or subject to special procedures.<sup>22</sup>

The mayor or manager, as chief executive officer, is the head of the police department in cities unless the PFC has been granted optional powers by the electors, and is responsible for ensuring that city ordinances and state laws are observed and enforced and that all city officers and employees discharge their duties. The police chief is head of the department, under the direction of the mayor or manager or village board and must obey lawful written orders from the chief executive or the governing body.

Where a PFC is mandated by population, the governing body cannot

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exercise powers reserved to the PFC relating to hiring, promotion, and discipline of the chief and officers. Even in municipalities without a PFC, the governing body cannot handle

disciplinary matters of police officers or the chief without putting in place an impartial committee or person to function in place of a PFC.

With an understanding of the basics, municipalities can better ensure that municipal police departments effectively serve the community.

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1. See *Madison Police Department Policy and Procedure Review*, OIR Group, Report to the City of Madison and the Madison Police Department Policy and Procedure Review Ad Hoc Committee (Dec. 2017) at pp. 1-2.
2. Wis. Stat. § 62.09(8)(a).
3. Wis. Stat. § 62.09(8)(d).
4. See Wis. Stat. Ch. 64 and 64.15
5. Wis. Stat. §§ 64.11 and 64.15.
6. The same statutory provisions that apply to a police chief apply to the chief of a combined protective services department. For the sake of simplicity, the article refers to police chief.
7. Although 62.13 often refers to police and fire commissions as the "board of police and fire commissioners" or "board," this article refers to the body as a PFC or commission to avoid possible confusion with village boards. The reference to PFC or commission, generally, is intended here to include bodies that deal with only a single department (i.e., police commissions).
8. Wis. Stat. §62.13(3).
9. Wis. Stat. § 62.09(13)(a).
10. Because "lawful order" is not statutorily defined, a court would likely define "lawful" by its common dictionary definition of "allowed by the law or not prohibited by the law." Case law doesn't provide direct guidance as to what the parameters of lawful orders might be in this context, but the issue was peripherally discussed in *Busche v. Burkee*, 649 F.2d 509, 518 (7th Cir. 1981). In *Busche*, the mayor twice ordered the police chief to deliver a termination letter to an indicted officer despite the chief's explanation that it was unlawful to terminate the officer without providing pre-termination due process. Although the mayor's order was in fact unlawful, the chief believed department regulations required him to obey the mayor's order after stating his objections. In a peripheral discussion involving agency, the court noted that the mayor was the head of the police department and his order requiring the officer's termination was not outside the range of "normal personnel actions that an executive officer is, in general, empowered to undertake or initiate...." As examples that would be outside the range, the court used the examples of the mayor ordering corporal punishment or imprisonment.
11. Wis. Stat. § 66.0511.
12. Wis. Stat. §§ 61.34 and 62.11(5).
13. See fn 7.
14. *Conway v. Bd. of Police and Fire Comm'rs of City of Madison*, 262 Wis. 2d 1, 20, 662 N.W.2d 335 (2003), citing *State ex. rel. Pieritz v. Hartwig*, 201 Wis. 450, 230 N.W. 42 (1930).
15. *State ex. rel. Pieritz v. Hartwig*, 201 Wis. 450, 230 N.W. 42 (1930).
16. The term "discipline," as it is used under Wis. Stat. §§ 62.13(5)(em) and 61.65(3g)(d)2, refers to the suspension, reduction in rank, suspension and reduction in rank, or termination of a firefighter or police officer or the department chief.
17. Wis. Stat. §§ 62.13(12), 61.65(5).
18. See fn. 3.
19. See Wis. Stat. §§ 61.65(1)(am) and 62.13(6m). This prohibition does not apply if the officer's status is probationary or if the officer is covered by a valid and enforceable contract of employment or collective bargaining agreement providing for a fair review prior to discipline.
20. *Id.*
21. Wis. Stat. § 62.13(6).
22. For example, state standards for law enforcement officers, state statutes governing rights of law enforcement officers, or matters that are subject to an existing collective bargaining agreement or subject to mandatory bargaining under Wis. Stat. 111.70 the Municipal Employment Relations Act.




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