



Fire and Police Commission

Michael G. Tobin
Executive Director

Richard C. Cox
Chair

Carolina M. Stark
Vice-Chair

Leonard J. Sobczak
Ernesto A. Baca
Earl A. Buford
Kathryn A. Hein
Carolina M. Stark
Paoi X. Lor
Commissioners

October 24, 2008

Finance and Personnel Committee
City Hall – Room 205
200 E. Wells Street
Milwaukee, WI 53202

Re: Budget Amendment Concerning Fire and Police Commission Investigator/Auditor

Dear Committee Members:

During the public meeting of the Finance and Personnel Committee on October 23, 2008, a request to authorize a private automobile allowance for the Fire and Police Commission (FPC) Investigator/Auditor was delayed because it was announced that a budget amendment would be proposed to eliminate the position. The reason for the amendment was purportedly due to the belief that the FPC lacks legal authority to conduct investigations. The purpose of this correspondence is to clarify, in no uncertain terms, that the FPC does in fact have investigatory authority and that the Investigator/ Auditor position is essential to carrying out the mission of the FPC to provide a legitimate and functional citizen complaint process.

A legal opinion was requested when the Investigator/Auditor position was first considered by the Common Council in response to the PARC report and citizen displeasure with a non-functioning complaint process. In that opinion dated February 20, 2007, the City Attorney stated, "It is our opinion that these investigators may conduct a preliminary investigation of citizen complaints..." opinion pg.4. The City Attorney legal opinion succinctly concludes that the FPC possesses the authority to investigate citizen complaints.

The City Attorney opinion also recommended delaying implementation of the investigator model until the Wisconsin Supreme Court ruled on issues concerning the authority of the FPC to promulgate its own rules for handling citizen complaints in the underlying case of the El Rey grocery store search warrant, known as *Castenada v. Milwaukee Fire and Police Commission*. On July 17, 2007, the Wisconsin Supreme Court issued its ruling in that case, declaring in no uncertain terms that the FPC has "express and implied authority to promulgate rules relating to procedures for the filing, **investigation** (emphasis added), and public trial of citizen complaints." The City Attorney legal opinion and the summary of the Wisconsin Supreme Court decision confirming that the FPC has the authority to investigate citizen complaints are attached to this correspondence for your review.

The issue of whether the FPC has authority to investigate citizen complaints has been resolved by the Wisconsin Supreme Court and the Milwaukee City Attorney. The FPC possesses the authority to investigate citizen complaints. As a result, and based upon the direction given to us by the Common

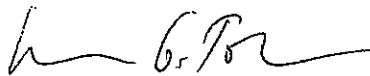
Council, we have commenced a revamping of the citizen complaint process. We have drawn from the best practices of successful police oversight agencies across the United States to design our citizen complaint program. The revised complaint process is designed around the concept that a fair, impartial, and complete investigation should be conducted to categorize, screen, and process complaints in an orderly and transparent manner. The experience of our pilot program has shown that a proper investigation can exonerate innocent police officers and identify incidents that deserve closer scrutiny in a significantly more efficient manner than the previous archaic practice of scheduling all complaints for a citizen board trial.

The Investigator/Auditor also performs the additional function of complying with the directives of the Common Council set forth in Chapter 314 of the Milwaukee Code of Ordinances. This ordinance requires the FPC to monitor the complaints that are filed directly with the Police Department and review such investigations when a complainant is not satisfied with the police investigation. The requirements of this ordinance were enacted by the Common Council in response to the PARC report, citizen outrage relating to several publicized incidents of police misconduct, and general dissatisfaction with the previous non-functional complaint procedures. The FPC cannot comply with the directives of this ordinance without an Investigator/Auditor.

We are in the midst of implementing the intent of the Common Council to provide a viable, transparent, and fair citizen complaint system that will garner the trust and support of our community. We will be unable to implement this program in the absence of a trained, professional Investigator/Auditor. The position is absolutely essential to the success of our citizen complaint program. I urge you to authorize expenditures to continue our progress in revamping the FPC citizen complaint process and allow us to respond in a meaningful manner to all allegations of police misconduct.

As always, I remain available for any questions or concerns you may have.

Sincerely,




Michael G. Tobin
Executive Director

MGT:rk

Att.

cc: Council President Willie Hines, Jr.

 [West Reporter Image \(PDF\)](#)

303 Wis.2d 570, 735 N.W.2d 131, 2007 WI 103

[Briefs and Other Related Documents](#)

Supreme Court of Wisconsin.
STATE ex rel. Jose **CASTANEDA**, Plaintiff-Respondent,

v.

Woody WELCH, Chairman, Milwaukee Fire and Police Commission, Eric Mandel Johnson, Vice Chair, Milwaukee Fire and Police Commission, Carla Y. Cross, Leonard J. Sobczak, Ernesto A. Baca, Members of the Milwaukee Fire and Police Commission, David L. Heard, Executive Director and Milwaukee Fire and Police Commission, Defendants-Appellants.

No. 2004AP3306.

Argued March 6, 2007.

Decided July 17, 2007.


Background: State, on behalf of person aggrieved by city police officers' execution of search warrant at grocery store and tortilla factory, sought declaratory judgment that rule promulgated by city's fire and police commission (FPC) board, to implement procedures for handling statutory citizen complaints seeking removal of a member of a fire or police department in a city of the first class, i.e., population of 150,000 or more, was invalid and unlawful. The Circuit Court, Milwaukee County, Patricia D. McMahon, J., declared the rule invalid in its entirety. City officials appealed. The Court of Appeals, 2006 WL 2773082, certified the case to the Supreme Court.

Holdings: The Supreme Court, David T. Prosser, J., held that:

- (1) board had express and implied authority to promulgate rules relating to procedures for the filing, investigation, and public trial of statutory citizen complaints;
- (2) provision of board's rule, implying that a complainant must be able to cite a violation of a specific rule or standard operating procedure in order to file a complaint, was invalid;
- (3) provision specifying who may file a statutory citizen complaint, was invalid;
- (4) provision requiring complainant to identify the accused member, was invalid; and
- (5) provision regarding dismissal of complaint was valid.

Circuit court order modified and, as modified, affirmed; rights declared.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

↔ [30 Appeal and Error](#)

↔ [30XVI Review](#)


↔ [30XVI\(F\) Trial De Novo](#)

↔ [30k892 Trial De Novo](#)

↔ [30k893 Cases Triable in Appellate Court](#)

↔ [30k893\(1\) k. In General. Most Cited Cases](#)

Whether an administrative agency has authority to promulgate rules requires statutory interpretation, which is a question of law that is reviewed de novo.

[2]  [KeyCite Citing References for this Headnote](#)

GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
LINDA ULISS BURKE
VINCENT D. MOSCHELLA
Deputy City Attorneys

CITY OF
MILWAUKEE
Office of the City Attorney

THOMAS O. GARTNER
BRUCE D. SCHRIMPF
ROXANE L. CRAWFORD
SUSAN D. BICKERT
STUART S. MUKAMAL
THOMAS J. BEAMISH
MAURITA F. HOLREN
JOHN J. HEINEN
MICHAEL G. TOBIN
DAVID J. STANGSZ
SUSAN E. LAPPEN
JAN A. SMOKOWICZ
PATRICIA A. FRICKER
HEIDI WICK SPOERL
KURT A. BEHLING
GREGG C. HAGOPIAN
ELLEN H. TANGEN
MELANIE R. SWANK
JAY A. UNORA
DONALD L. SCHRIEFER
EDWARD M. EHRlich
LEONARD A. TOKUS
VINCENT J. BOBOT
MIRIAM R. HORWITZ
MARYNELL REGAN
G. O'SULLIVAN-CROWLEY
KATHRYN M. ZALEWSKI
MEGAN T. CRUMP
ELOISA DE LEON
ADAM B. STEPHENS
KEVIN P. SULLIVAN
BETH CONRADSON CLEARY
THOMAS D. MILLER
Assistant City Attorneys

February 20, 2007

Alderman Joe Davis, Sr.
Alderman Michael Murphy
Room 205 - City Hall

Re: New Fire and Police Commission Investigator Positions

Dear Aldermen Davis and Murphy:

You have each requested the opinion of this office concerning the inclusion in the 2007 City budget of two new "Investigator" positions on the staff of the Fire and Police Commission. As stated by Alderman Murphy, the purpose for the creation of these positions was "to strengthen its [the Commission's] role as an independent monitor of investigations into police and fire misconduct." Both of you have inquired as to the nature of any conflicts of interest or other legal problems that might arise as a consequence of the creation of these positions. Alderman Davis's request specifically raised the issues of whether due process concerns might be raised as a consequence of: (a) the activities of these investigators in conjunction with the investigation of citizen complaints, and any recommendation as to whether a particular citizen complaint should proceed to trial; and (b) the nature and extent of any contacts between these investigators and members of the Commission itself.

Alderman Davis additionally inquired as to whether the Commission has authority to appoint a community task force to assist it in the formulation of policy recommendations in conjunction with its role in reviewing and formulating general policies and standards for the Fire Department and the Police Department (collectively the "Departments") per Wis. Stat. § 62.50(1m) and other pertinent provisions of law.

OFFICE OF THE CITY ATTORNEY

Milwaukee City Hall Suite 800 • 200 East Wells Street • Milwaukee, Wisconsin 53202-3561 • Telephone: 414.286.2601 • TDD: 414.286.2025 • Fax: 414.286.8550

As discussed in this legal opinion, our general conclusions are as follows, under current statutes:

1. With some limitations, Commission staff members may conduct investigations to aid the Commission in reviewing how the Departments have handled internal disciplinary investigations, as well as citizen complaints filed with the Departments.
2. The Commission staff members may not conduct internal investigations or interfere in those investigations while they are ongoing, nor may they investigate citizen complaints that are filed with the Departments unless and until the citizen-complainant pursues the complaint with the Commission.
3. Regarding citizen complaints filed directly with the Commission, the pendency of a case on point before the Wisconsin Supreme Court prevents us from providing definitive guidance as to the permissible use of investigators in this context. In our opinion, Commission staff could be used to review individual citizen complaints in order to determine whether a hearing should be scheduled. Beyond that, due process concerns would likely prevent the use of a Commission staff member's investigation at the hearing.
4. A policy must be adopted limiting the communication between staff investigators and Commission members.
5. The Commission may appoint an advisory community task force.

1. The Permissible Scope of the Investigators' Responsibilities.

Our analysis of this question is made difficult because of the structure of Wis. Stat. § 62.50, and because of the current litigation that is pending in the Wisconsin Supreme Court, which may interpret Wis. Stat. § 62.50 and provide instruction on some of the issues you raise.

Wisconsin Statute § 62.50 allocates responsibilities to the Commission, the Chief Engineer-Fire, and the Chief of Police, the Common Council, and the Mayor. The

statutes relevant to your questions are Wis. Stat. §§ 62.50(1m), (3), (17), and (23). These statutes follow a consistent theme: the Commission's responsibilities are rulemaking, policy review, approval of appointments, review (with the Chiefs' advice) as to "the efficiency and general good conduct of" the Departments, and service as the tribunal in disciplinary appeals and citizen-complaint proceedings. The Chiefs' responsibilities embrace management and control of the day-to-day functioning of their Departments, which includes rulemaking (to the extent that this authority has been delegated to the Chiefs by the Commission), and management of the Departments' internal-investigation and disciplinary functions, subject to Commission oversight.

Please note Wis. Stat. § 66.0101(11), denotes Wis. Stat. § 62.50 as an "enactment of statewide concern for the purpose of providing uniform regulation of police and fire departments." This means that the City may not adopt ordinances that are inconsistent with any provision of Wis. Stat. § 62.50.

a. Internal Disciplinary Proceedings.

Wis. Stat. § 62.50(23) allocates responsibility to the Chiefs for the good conduct of the Department. This would include internal investigations. The Board's authority is to review the conduct of the Department. Additionally, Wis. Stat. § 62.50(13) accords to the Chiefs the authority to initiate the disciplinary process against employees of the Departments. Thus, the statutes have specified the Chiefs as the initial enforcers of good conduct in their departments.

It is our conclusion, therefore, that the proposed Commission investigators may not interfere with ongoing internal investigations, or conduct their own internal investigations of police officers. They would be able to conduct a review of closed internal investigations as part of the oversight function of the Commission.

b. Citizen-Complaint Proceedings.

Citizen complaint proceedings are governed by Wis. Stat. § 62.50(19) and Milwaukee City Charter § 22-10. Both of these provisions allow aggrieved citizens to file complaints against members of the Departments directly with the

Alderman Joe Davis, Sr.
Alderman Michael Murphy

February 20, 2007

Page 4

Commission, and Charter § 22-10 allows the Commission itself to initiate such complaints. It is our opinion that these investigators may conduct a preliminary investigation of citizen complaints that have been filed with the Commission, but not those that are filed with the Departments unless and until the citizen pursues the matter with the Commission.¹ As a general proposition, Commission investigators would be free to interview the citizen-complainant and any citizen witnesses, although we suggest that care be taken not to interfere with matters that are the subject of a pending criminal investigation.

We believe that a Commission investigator may interview police officers, firefighters, or other employees of the Departments on a voluntary basis only, subject to these individuals' rights to union representation or other rights afforded by the Police Officers' Bill of Rights, Wis. Stat. ch. 164 of other applicable law. See, *Odds v. Board of Fire and Police Commissioners for the City of Milwaukee*, 108 Wis. 2d 143, 155-156, 321 N.W.2d 161, 168 (1982), which held that: "It is of course, the law that superiors in a police force may question a subordinate and ask: ' . . . questions specifically, directly, and narrowly relating to the performance of his official duties as distinguished from his beliefs or other matters that are not within the scope of the specific duties. . . .', " quoting *Spevack v. Klein*, 385 U.S. 511, 519, 87 S.Ct. 625, 630, 17 L.Ed. 2d 574 (1967) (J. Fortas, concurring) (emphasis added).

As we stated above, while our opinion is that the Commission may use its staff to research, or "investigate," citizen complaints filed with it, we must inform you that the issue of what the Commission may do regarding citizen complaints, beyond holding a trial, is squarely before the Wisconsin Supreme Court in *State ex rel. Castaneda v. Welch*, which was certified by the Court of Appeals to the Supreme Court on September 28, 2006. The trial court in that case determined that the Commission did not have the authority to adopt rules for the processing of citizen

¹ In this respect, please note that the recent report entitled "Promoting Police Accountability in Milwaukee: Strengthening the Fire and Police Commission" issued by the Police Assessment Resource Center (hereafter the "PARC Report") noted that over 90% of all citizen complaints against members of the Departments are filed with the Departments themselves. Nothing within Wis. Stat. § 62.50(19), Milwaukee City Charter § 22-10, or any other provision of law precludes this practice. As a practical matter, problems will inevitably arise if Commission investigators are inserted into citizen complaints that the Departments are continuing to investigate on their own.

complaints filed under § 62.50(19), especially if they deviated from the procedure in the statute, which only explicitly authorizes scheduling a trial. The Court of Appeals did not rule on the issue; instead, it certified the matter directly to the Supreme Court, which has accepted the certification. Briefing has been completed and the case is scheduled for oral argument.

For this reason, it is our advice that using personnel to investigate citizen complaints should await a decision from the Supreme Court. Again, retrospectively investigating how the Department has handled citizen complaints filed with the Department is permissible as part of the Commission's review function.

2. Due Process Issues Impinging Upon the Investigators' Performance of Their Duties.

Both of you have raised the issue of whether the activities of Commission investigators might implicate constitutional due process concerns. There are two aspects of due process that we believe merit attention in this respect as discussed below.

The activities and responsibilities of the investigators must be structured so as to avoid infringement upon the procedural due process rights of parties to Commission proceedings. Strict observance of the parties' procedural due process rights are important to safeguard the constitutional rights of all parties.

a. Discussion of the law.

"Due process" is a flexible concept and its application depends heavily upon the facts and circumstances of each case:

The nature and extent of the process due to a party depends on the nature of the case and is influenced by the grievousness of the loss which may be suffered. Determining what due process requires in any particular case must begin with an analysis of the government function involved and the private interest affected by the

governmental action. A court balances the private interest, the risk of an erroneous deprivation of the interest through the procedures used, and the government interests in determining the process due.

In re Termination of Parental Rights to Daniel R.S., 2005 WI 160 ¶ 57, 286 Wis. 2d 278, 307, 706 N.W.2d 269, 284. The interests of the parties to a citizen complaint proceeding before the Commission are very significant, and include the citizen's right to be heard and to have his or her grievances redressed in a fair manner, and the right of the accused police officer, firefighter, or other involved employee of the Departments to defend his or her job performance, reputation, and (in some cases) career.

A fundamental guarantee of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976); *In re Termination of Parental Rights to Daniel R.S.*, *supra*, 2005 WI 160 ¶ 64, 286 Wis. 2d at 310, 706 N.W.2d at 286; *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 512, 261 N.W.2d 434, 444 (1978). A closely related element of constitutional due process is the right to a fair hearing conducted before a fair tribunal. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *Marder v. Board of Regents of the University of Wisconsin System*, 2005 WI 159 ¶ 27, 286 Wis. 2d 252, 270, 706 N.W.2d 110, 119; *Guthrie v. Wisconsin Employment Relations Commission*, 111 Wis. 2d 447, 454, 331 N.W.2d 331, 335 (1983). Due process and fair play can be violated "where there is bias or unfairness in fact [or when] . . . the risk of bias is impermissibly high." *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 25, 498 N.W.2d 842, 847 (1993). A decisionmaker violates due process and fair play by harboring bias, or an impermissibly high risk of bias, or prejudging the facts or the application of the law. *Id.*; *Keen v. Dane County Board of Supervisors*, 2004 WI App 26 ¶ 14, 269 Wis. 2d 488, 497, 676 N.W.2d 154, 159. Accordingly, great care must be taken to assure that the investigatory activities engaged in by the new Commission investigators not result in actual or perceived bias on the part of members of the Commission charged with the responsibility of making determinations in citizen complaint proceedings.

A second and somewhat related constitutional due process concern is the potential for impermissible intermixing of prosecutorial and adjudicatory functions, the former represented by activities of the Commission investigators and the latter represented by the responsibilities of the Commission itself acting as a tribunal. Such intermixing is not necessarily prohibited and must be evaluated on a case-by-case basis in order to determine whether infringement of due process rights in the form of impermissible bias or in some other form has in fact occurred. See *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 492-497, 96 S.Ct. 2308, 2314-2316, 49 L.Ed. 2d 712 (1976); *Withrow v. Larkin*, 421 U.S. 35, 46-55, 95 S.Ct. 1456, 1464-1468, 43 L.Ed. 2d 712 (1975); *Kruczek v. Department of Workforce Development*, 2005 WI App 12 ¶¶ 34-36, 278 Wis. 2d 563, 582-584, 692 N.W.2d 286, 296-297.

b. Due Process Issues Regarding the Investigators.

While these principles of constitutional due process are well-established, any inquiry as to whether compliance with those principles has been achieved requires scrutiny of the particular facts of each case. Thus, it is especially important to carefully scrutinize the job descriptions and duties of the new Commission investigators, and how their responsibilities fit into the organizational structures of both the Commission and the Departments. Such scrutiny requires ongoing review.

The following comments would be generally applicable: In our view, the activities of Commission investigators in interviewing witnesses, investigating citizen complaints, and making recommendations to the Commission as to whether or not a particular citizen complaint should proceed to trial will not implicate any significant risk of constitutional due process violations. However, this requires the establishment of a written policy limiting direct communication between investigators and Commissioners during the investigatory phase. The greater the degree of insulation the more likely it is that the Commissioners will not be prejudiced by prior contact with the matter and thus open to an accusation of bias such as would implicate potential constitutional due process violations.

Alderman Joe Davis, Sr.
Alderman Michael Murphy

February 20, 2007

Page 8

Such measures would avoid the risk of both impermissible intermixture and of bias. As discussed in *Hortonville, supra*, this would not prevent a Commissioner from participating in the determination of a citizen complaint when he or she, through some other source, has learned details of a case that are otherwise available to the general public or that may have come to his or her attention in the course of performing other duties as a Commissioner. A Commissioner should not gain such knowledge as a consequence of the Commission's investigatory activities at any time prior to the receipt of the Commission staff's final recommendation as to the advisability of proceeding to trial.

3. The Community Task Force.

We finally respond to Alderman Davis's inquiry as to the authority of the Commission to appoint a community task force to assist in the formulation of policy recommendations as follows: The Commission does possess authority in this respect, but only if the community task force acts in a purely advisory capacity. The Commission cannot delegate any of its duties or statutory responsibilities to any task force or to any other advisory individual, committee, consultant, or group. A municipality may not contract away its governmental powers as it is "wholly a creature of legislatively delegated power, [and therefore] cannot by ordinance or contract bargain away that portion of the state's sovereignty which has been conferred upon it." *Town of Brockway v. City of Black River Falls*, 2005 WI App 174 ¶ 27, 285 Wis. 2d 708, 726, 702 N.W.2d 418, 427-428 quoting *State ex rel. Hammermill Paper Company v. La Plante*, 58 Wis. 2d 32, 80, 205 N.W.2d 784, 811 (1973); see also *Adamczyk v. Town of Caledonia*, 52 Wis. 2d 270, 275, 190 N.W.2d 137, 140 (1971). The Commission may rely upon recommendations and other information provided by such outside sources if and only if it itself makes the ultimate decision as to whether to accept or reject such recommendations.

Finally, we call to your attention the fact that the activities and records of any such task force impaneled by the Commission would be subject to the requirements of the Wisconsin Public Records Law and the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.21-19.39 and 19.81-19.98 as a committee created by a rule or order of the Commission. See, e.g., Wis. Stat. §§ 19.32(1), 19.82(1); *State v. Swanson*, 92

Alderman Joe Davis, Sr.
Alderman Michael Murphy

February 20, 2007

Page 9

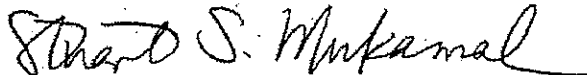
Wis. 2d 310, 284 N.W.2d 655 (1979); 78 Op. Atty. Gen. (4/28/1989); 63 Op. Atty. Gen. 363 (9/13/1974).

If you have any further questions concerning any of these items, please do not hesitate to contact this office.

Very truly yours,



GRANT F. LANGLEY
City Attorney



STUART S. MUKAMAL
Assistant City Attorney

SSM:lmb

c: Ron Leonhardt, City Clerk
William Wentlandt, Fire Chief
Nannette Hegerty, Police Chief
Mayor Tom Barrett
Fire & Police Commission
Maria Monteagudo, Dept. of Employee Relations Director
1033-2006-3035/112482