

## M E M O R A N D U M

**To: Mayor and Council**  
**From: Stephen K. Postema, City Attorney**  
**Re: Legal Issues Concerning Policing Commission**  
**Date: September 28, 2018**

### **Introduction**

At the work session of September 13, 2018, the City Council requested that I provide public information concerning the legal parameters of a Policing Commission. This is an update of a public memo on the same issues dated January 16, 2018.

### **The City Charter**

Generally, the City has broad powers under the Charter. City Charter, Section 3.1. Those powers include powers granted under state law, including the Michigan Home Rule City Act. MCL 117.

The City Charter provides broad authority to the police: "Police officers shall have all the powers, immunities, and privileges granted to peace officers by law for the making of arrests, the preservation of order, and the safety of persons and property in the City." City Charter, Section 5.8(b).

The City Charter states that the police department "shall be in the immediate charge of the Chief of Police, who shall be responsible to the City Administrator." City Charter, Section 5.8. The City Administrator, in turn, is accountable to the City Council. City Charter, Section 5.1.

The City Charter, Section 5.17 generally allows for the creation of citizen boards and commissions:

(a) The Council may create citizen boards for each of the following departments: Police Department. . . . Each board shall serve as an advisory body to give counsel and advice to the head of the department and to the City Administrator in respect to all such matters coming within the authority of its department as the Council prescribes and shall have authority to make recommendations respecting such matters to the department head, the City Administrator, and the Council. The City Administrator, the Mayor, and Council Members shall be privileged to attend the meetings of each such board and to take part in its discussions and shall receive copies of the minutes of the board's meetings and of all reports prepared by it. The

creation and operation of any such board shall not serve to impair the authority and responsibility of the department head, the City Administrator, and the Council as otherwise provided in this charter.

(b)The Council may create special commissions, including commissions on housing, human relations, and civil defense, with authority to make studies, submit reports and recommendations, and to take such other action as may be prescribed by the Council not inconsistent with this Charter.

## **Labor Contracts**

The City has negotiated agreements (contracts) with the Police Department employees called collective bargaining agreements.<sup>1</sup> A Commission's actions cannot interfere with those agreements. To the extent the Commission reviews in some manner complaints made against police officers, it is important to recognize that the investigation into the complaint and disciplinary procedures involving police officers are governed by provisions in the Ann Arbor Police Officers Association (AAPOA) contract, which covers the majority of sworn police officers (as well as in the Command Officers Association of Michigan (COAM) contract, which covers Sergeants and Lieutenants):

1. Upon receiving a complaint against an officer, the City has 14 days to inform the employee about the complaint and identify the complainant. Certain legal rights apply at this point concerning having a union steward present and involving the use of statements in criminal court proceedings.
2. After this notice is provided to the employee, the complaint has to be formally written and presented to the employee. The employee can reply and then the investigation is conducted. The City has 14 days to investigate following the employee's reply, although the time can be extended with an explanation about why to the employee and the union. The employee's interview is taped pursuant to the contract language and witness interviews are taped if both parties agree.
3. After completion of the investigation, the investigation goes to the Deputy Chief for review. (There can be no consideration of prior disciplines that occurred more than 24 months earlier when considering discipline for the current incident.)
4. The Deputy Chief, within 14 days, can issue a written discipline or, if he thinks a greater discipline is appropriate, can send it to the Chief with a recommendation. The Chief then has 14 days to issue his decision.

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<sup>1</sup> The Police Department has five unions which are only in the police department and in addition, has employees from two other City-wide unions.

5. Discipline, by contract, is limited to the following: Written Warning, Demotion, Reassignment, Suspension, and Dismissal.

6. Once the employee is disciplined, he/she has 14 days to appeal it under the grievance procedure. If the discipline is upheld through the grievance procedure, the Union may take the matter to arbitration within 14 days after the City's final answer. The arbitrator's decision is binding on both parties.

### **A Police Commission is generally an Advisory Body**

As noted above, the Charter generally provides that citizen boards and commissions are advisory bodies to the City. To the extent that a Commission is providing advice to the AAPD, the City Administrator, and the Council, the authority for that role is clear under City Charter, Section 5.17(a). To the extent the Commission has educational roles, for example, such roles would be covered under City Charter, Section 15.7(b), but any such roles would have to be prescribed by the Council and could not be inconsistent with the Charter.

A Commission has no legal existence apart from the City, as it derives its authority from the City Council. A Commission has Charter limitations automatically placed on it, and limitations placed on it by the City Council. For example, a Commission's operation cannot impair the authority of the Police Chief, the City Administrator, or the City Council. And this makes sense in that this is the system of governance adopted by the City and the City Charter specifically defines the roles of the Police Chief, the City Administrator, and the City Council.

As a practical matter, this Commission will be called upon to provide independent advice and judgment based on community experience to the Police Chief, the City Administrator, and the City Council. The Commission will provide this advice through reports and recommendations, and this Commission can expect that these reports and recommendations will be reviewed and considered by the Police Chief, the City Administrator, and the City Council. However, such reports and recommendations are not binding, factually, legally, or in any other manner, on the Police Chief, the City Administrator, or the City Council. If they were binding, they would transfer policing responsibilities to the Commission in a manner not contemplated by the Charter.

### **Independence**

Any Commission created by City Council is part of the City. It is not an independent legal entity. Any "independence" by the Commission would be, as with any board or commission, limited to operating the commission within the parameters of any resolution or ordinance setting up the Commission.

For example, a Commission has no independent authority to contract. Only the Administrator or the Council has that authority under the Charter. Since no Commission is a separate legal entity, but rather is part of the City, all City practices and policies concerning contracting would have to be followed. If the Council approved a budget for this commission, each contract contemplated would still, under the Charter, need to be approved by either the Council, or if less than \$25,000 for goods and services, by the City Administrator. (The manner of approving these contracts is for the Council to decide.) Additionally, there are standard City procurement policies that would have to be followed.

Any paid employee providing assistance to this Commission is a City employee. Therefore, any hiring must follow the standard process set forth through the Human Resources Department. Further, any City employee providing logistical support for the Commission, like other employees, must be supervised by the management of the department in which the employee resides.

It is important to note that both procurement and hiring policies are in place to ensure that both are done in a manner that is equitable, consistent, non-discriminatory and compliant with federal, state, and local laws. These are basic checks and balances inherent in City governance.

### **Outside Counsel**

Generally, the Charter recognizes that “the Attorney shall be attorney and counsel for the City. . . .” City Charter, Section 5.2. Because of this, the Office of City Attorney advises all of the current Boards and Commissions. A Commission has no authority to contract with outside legal counsel on its own.

Similar to the contract issue outlined above, the process of hiring of outside counsel for the City is set forth in the Charter. Overall, it is the responsibility of the City Council to retain outside legal counsel for the City. (This is done under the contracting ordinance for amounts less than \$25,000, with approval of the City Administrator.) That is, if the City Council wanted additional legal advice on any matter, it is free to obtain it.

Council can determine whether outside Counsel is needed to provide advice on legal matters to this Commission in order to assist it in providing advice to the City Council, City Administrator, or the Police Chief. Such advice would ultimately be for the benefit of the City Council and the procurement of such advice (within generally defined parameters) must be approved by the City Council or City Administrator. This is simply part of the checks and balances of the Charter.

If this Commission requests the City to Council to retain outside Counsel for any purpose other than preparing advice for the City Council, that purpose must be agreed to by the City Council. For example, some have suggested that that outside counsel would be needed to provide legal advice on issues as to the Commission’s “own rights” On this issue, it is important that the rights, powers, and responsibilities be clearly laid out in any governing ordinance and bylaws. In the end, on issues of Commission governance, it is

for the City Council to determine any such rights, powers, and responsibilities of the Commission.

### **Subpoena Authority**

There have been suggestions that this Commission should have “subpoena powers.” There are significant legal issues with subpoenaing residents of the City, City employees, or police officers; some of these are discussed below. The City Council does not employ subpoenas to compel residents to speak to it, and the City Attorney has authority to use subpoena powers only in litigation and enforcement actions as allowed by law.

Overall, unlike many cities (Detroit, Lansing, Grand Rapids, Kalamazoo), the Ann Arbor City Charter has no specific provision granting subpoena power to its City Council. Because the City Council may not have this power, it would not have the authority to delegate such power to a Commission. This is why it is important to look at the source of authority in any City.

There is an unresolved legal issue as to whether subpoena authority to a Council is granted fully through the Home Rule City Act. The one case that discusses this issue makes clear that the Home Rule City Act can provide a basis for subpoena power.<sup>2</sup> However, that case also finds that the scope of subpoena power would be limited to that scope specifically set forth in the Charter of that City itself. Generally, subpoena power is not inferred. The Ann Arbor City Charter has no such provision for subpoena power.

Second, even Michigan cities that provide subpoena power to their Councils in their Charters do not necessarily provide it to their Police Commissions (e.g., Grand Rapids). The Police Commissions of Detroit and Lansing that have subpoena power, also actually have the Charter authority to discipline officers, so they are very different Commissions, and their powers are set by City Charter.

Third, even if the City Charter allowed subpoenas it is important to understand that a subpoena is a request for documents or for a person to testify. It is necessary for a court to actually enforce a subpoena, and a court would require the specific legal authority of the entity requesting such a subpoena. It is questionable whether any court would enforce a subpoena that an advisory Commission requests, particularly without a specific Charter authorization. Further, it would require an attorney (either the City Attorney or a special counsel) to request the Court enforce such a subpoena and an attorney would not make such a request if it was not well grounded in law.

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<sup>2</sup> *Vance v Ananich*, 145 Mich. App. 833 (1985).

## **Complaint Procedure**

To the extent that the Commission receives complaints against officers, those complaints must be turned over to the AAPD for investigation. Both CBAs require that complaints be disclosed to the named officers within fourteen calendar days of receipt. Given that the CBA is a contract between the City and unions, and the fact that the Commission is part of the City, the contractual timelines are likely triggered upon the Commission's receipt of any complaint.

Furthermore, any complaint of **criminal** wrongdoing by an officer would have to immediately be turned over to the AAPD for investigation and would be referred to the Michigan State Police. A Commission has no choice in the matter. A Commission that failed to turn over such information could create serious liability issues for the City, and jeopardize the rights of the criminally accused.

In general, withholding complaints from the Police Chief would obviously also impair the authority of the Chief to administer the AAPD.

## **Internal Police Investigations**

As previously explained, the Collective Bargaining Agreement sets forth a collectively-bargained process, including strict timelines, for internal investigations into officer misconduct and the issuance of any resulting discipline. The process outlined in the CBA provides that only management officials of the Ann Arbor Police Department can investigate a disciplinary complaint and issue discipline. There is no place in the CBA that allows for another entity – such as a Commission – to take part in the investigation or to be involved in any discipline arising from an internal investigation.

This does not prevent the Commission from reviewing the incident after the internal investigation is completed.

## **Open Meetings Act**

While the Michigan Open Meetings Act may not necessarily apply to a purely advisory commission, the City Council has determined that all Boards and Commission meetings be held in accordance with the OMA. Resolution Regarding Open Meetings for City Committees, Commissions, Boards, and Task Forces. R-642-11-91 (Approved Nov. 4, 1991.)

## **Access to Police Records**

There are legal constraints preventing the release of some police records and information. For example, the current Collective Bargaining Agreement (CBA) between the City and the Ann Arbor Police Officer's Association (AAPOA) specifically limits who can read, view and/or have a copy of an officer's personnel file. The list only includes the Chief, Deputy Chiefs, Chief's Management Assistant, Professional Standards Lieutenant and Sergeant,

City or Assistant City Administrator, HR Director, City Attorney and Assistant City Attorney. The personnel files contain almost every type of document related to an officer's employment with the City including, but not limited to, disciplinary records, performance evaluations, commendations, attendance reports, etc. This limitation is consistent with the Freedom of Information Act (FOIA), which allows municipalities to exempt law enforcement personnel records. Therefore, a Commission would not have access to an officer's personnel records unless the language of the CBA was changed. This cannot be done unilaterally.