

Disciplinary Process - Police and Fire Commission

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Police officers and firefighters manage difficult and often dangerous situations. Fortunately, most protective services employees are dedicated public servants, and smaller communities may see years go by without need for formal disciplinary action against an officer or firefighter.

When an issue arises, the municipality must adhere to applicable procedures to reach a just resolution that will withstand judicial review.

The process for disciplining police officers and firefighters is a matter of statewide concern governed by state law.¹ Absent agreement by the employee, a suspension, reduction in rank or termination can be imposed only after a due process hearing before a board of police and fire commissioners (PFC) or its equivalent² While the right to a hearing does not extend to newly-hired employees still in a probationary status,³ an employee promoted

on a probationary basis is entitled to a hearing if a reduction in rank is based on misconduct allegations.⁴

The disciplinary process is governed by Wis. Stat. sec. 62.13(5)⁵ and any administrative rules adopted by the PFC ("PFC rules").⁶ This article provides an overview of the PFC disciplinary process.⁷

INITIATION OF DISCIPLINARY PROCEEDING

Charges seeking discipline of a police officer or firefighter may be filed by a department chief, by a member of



the PFC, the PFC as a body, or any aggrieved person.⁸ Complaints by "aggrieved persons" are also referred to as "citizen complaints."⁹ Once charges are filed, the municipality should provide the PFC with legal counsel indepen-

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1. *City of Madison v. State Dep't of Workforce Dev., Equal Rights Div.*, 2003 WI 76, para. 12, 262 Wis. 2d 652, 664 N.W.2d 584 (citing Wis. Stat. sec. 62.13(12)).
2. See Wis. Stat. §§ 61.65, 62.13(6m) (smaller cities and villages may use equivalent processes).
3. *Kaiser v. Bd. of Police & Fire Comm'rs*, 104 Wis.2d 498, 501, 503, 505-06, 311 N.W.2d 646 (1981).
4. See *Kraus v. City of Waukesha Police & Fire Comm'n*, 2003 WI 51, para. 77, 261 Wis. 2d 485, 662 N.W.2d 294; *Antisdell v. Oak Creek Police & Fire Comm'n*, 2000 WI 35, para. 13, 234 Wis. 2d 154, 609 N.W.2d 464.
5. The city of Milwaukee Fire and Police Commission operates under Wis. Stat. sec. 62.50, which is similar but not identical to sec. 62.13(5).
6. Wis. Stat. § 62.13(5)(g). PFC rules in some municipalities are posted online.
7. The structure and functions of a PFC have been thoroughly examined. C. Silverman, *Police and Fire Commissions, The Municipality* (April 2009).
8. Wis. Stat. sec. 62.13(5)(b).
9. Wis. Stat. sec. 62.50(19). PFC rules that define the class of "aggrieved persons" with standing to file charges too narrowly may be found invalid. *State ex rel. Castaneda v. Welch*, 2007 WI 103, para. 60, 303 Wis. 2d 570, 735 N.W.2d 131 (holding a rule defining an aggrieved person as "someone who is directly affected by the alleged misconduct, or the parent or legal guardian of a minor who is directly affected by the alleged misconduct" to be unduly restrictive).

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dent from municipal counsel to assist in managing the disciplinary process.¹⁰

Upon the PFC finding “just cause,” an officer or firefighter may be “suspended, reduced in rank, suspended and reduced in rank, or removed.”¹¹ For that reason, a chief will not file charges unless an unpaid suspension or greater penalty is sought.¹²

While the PFC as a body or any member may file and prosecute charges, this is generally inadvisable. If an occasion arises where this is appropriate, the PFC should delegate its prosecutorial role to a special counsel. A PFC member who prosecutes should act solely in that capacity and should not participate in the decisional process.

THE CHARGES

The minimum requirements of a due process hearing include timely and adequate notice, an impartial decision-maker, and the opportunity to confront and cross examine adverse witnesses.¹³ Accordingly, disciplinary charges must contain sufficient detail to allow the respondent to prepare an adequate defense.¹⁴ The charges should be framed in light of the seven “just cause” standards.¹⁵ The charges should identify the department rule or order allegedly violated, describe any investigation of the charges, and set forth fact allegations supporting the charges.¹⁶

INITIAL PROCESSING

The PFC must set a date for hearing not less than 10 days nor more than

30 days after service of the charges.¹⁷ Most matters will not be concluded within 30 days. While it is advisable to confirm the consent of the parties to continue the hearing beyond 30 days, if necessary, there is no reported decision suggesting that “continuing” the hearing beyond the 30 days violates the statute.

Typically the PFC sets an initial hearing to be held within 30 days of filing to address issues such as scheduling, discovery and pre-hearing motion practice. Months may elapse between the filing of charges and the final resolution, partly because due process requires that the employee be given a reasonable opportunity to be heard and partly because the PFC is composed of private citizens, often requiring that hearings be conducted during evening

10. *State ex rel. Hennekens v. City of River Falls Police & Fire Comm'n*, 124 Wis. 2d 413, 422, 369 N.W.2d 670 (1985).

11. Wis. Stat. sec. 62.13(5)(e).

12. The way the statute is worded, a chief may suspend a subordinate as a penalty, and the chief files charges with the PFC only if the subordinate requests a hearing. Wis. Stat. sec. 62.13(5)(c).

13. *State ex rel. DeLuca v. Common Council of City of Franklin*, 72 Wis. 2d 672, 679, 242 N.W.2d 689 (1976).

14. *Hennekens*, 124 Wis. 2d at 422.

15. Wis. Stat. sec. 62.13(5)(em).

16. *Id.* The just cause standards refer to the pre-filing investigation conducted by a department chief. It is doubtful that these parts of the standards apply to citizen complaints.

17. Wis. Stat. sec. 62.13(5)(d).



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hours. If the charges are serious enough that termination is sought, commonly the employee is placed on a paid leave status pending resolution of the process.

PFC rules may allow for dismissal of charges without an evidentiary hearing, if the charges are facially groundless or frivolous, have been resolved in a prior proceeding, or the complainant lacks standing.¹⁸ Although the statutes do not address it, PFC rules may provide for pre-hearing discovery.¹⁹ A PFC that has not adopted such rules may consider allowing some discovery to avoid a possible claim of a due process deprivation upon later judicial review.²⁰ If your PFC has not formally adopted administrative rules, it may be prudent to review rules developed in other municipalities to use as guidance in managing the pre-hearing process.

HEARING AND DECISION

The evidentiary hearing is a quasi-judicial administrative proceeding.²¹ It is public. Both the complainant and respondent may compel the attendance of witnesses by subpoenas to be issued by the PFC president on request.²² The

Wisconsin Supreme Court has upheld PFC rules providing for the employment of a hearing examiner to conduct both the pre-hearing process and the evidentiary hearing, at least where the rules have provided for the hearing to be videotaped.²³ The PFC issues its final decision based on the evidence as well as the examiner's report.²⁴

PFC rules may specify what, if any, evidentiary rules apply at the hearing. Given that the Wisconsin Supreme Court has described the hearing as having the elements of "fair play" fundamental to due process in an administrative law setting,²⁵ following the procedures applicable in Case 3 contested hearings under Wis. Stat. ch. 227, including the rules of evidence set forth in sec. 227.45, should satisfy due process. Erroneous evidentiary rulings may result in a due process deprivation, which would require a new hearing.²⁶

The complainant bears the burden of proof by a preponderance of the evidence.²⁷ The PFC's deliberations on the evidence should be conducted privately with its counsel; other municipal officials should not be present.²⁸

The PFC must issue its determination in writing within three days after the conclusion of the hearing.²⁹ Counsel for the PFC will assist in crafting a decision that clearly states the PFC's findings of fact and conclusions of law, as well as an order either imposing discipline or dismissing the charges. The written decision should address the seven just cause standards contained in Wis. Stat. sec. 62.13(5)(em). The decision and order must be filed with the secretary of the PFC.

REVIEW

If the PFC imposes discipline, the respondent has two avenues for judicial review: a right of statutory appeal to the circuit court under Wis. Stat. sec. 62.13(5)(i) and a petition to the circuit court for common law writ of certiorari.³⁰ The respondent may pursue both avenues of review, and the resolution of issues on the appeal is not binding relative to issues on certiorari review, even though the issues on the two methods of review may overlap.³¹ These are the exclusive methods of review; the PFC's

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18. See *City of Oshkosh Police & Fire Commission (PFC) Hearing Procedures*, sec. IX. (E) (April 1, 2014) (setting out thirteen grounds for dismissal of complaints at a non-evidentiary initial hearing).

19. *Conway v. Bd. of Police & Fire Comm'rs of City of Madison*, 2003 WI 53, para. 8, 262 Wis. 2d 1, 662 N.W.2d 335 (citing City of Madison PFC Rule 7.20).

20. See *Hennekens*, 124 Wis. 2d at 421-22 (rejecting due process claim based upon denial of discovery).

21. *Conway*, 2003 WI 53, para. 40.

22. Wis. Stat. sec. 62.13(5)(d).

23. *Conway*, 2003 WI 53, para. 47-50.

24. *Id.* para. 50.

25. *Id.* para. 40.

26. See *Umhoefer v. Police & Fire Comm'n of City of Mequon*, 2002 WI App 217, para. 22, 257 Wis. 2d 539, 652 N.W.2d 412 (officer's due process right to confront and cross-examine witnesses was violated when PFC erroneously allowed officer's ex-wife to invoke marital privilege).

27. *Matter of Owens*, 122 Wis. 2d 449, 455, 362 N.W.2d 171 (Ct. App. 1984).

28. *State ex rel. Heil v. Green Bay Police & Fire Comm'n*, 2002 WI App 228, para. 17, 256 Wis. 2d 1008, 652 N.W.2d 118 (presence of council member acting as mayor's representative sitting as a non-voting panel member during PFC deliberations gave a sufficient appearance of impropriety to taint the entire proceedings thereby violating officer's due process rights).

29. Wis. Stat. sec. 62.13(5)(f).

30. *Gentilli v. Bd. of Police & Fire Comm'rs of City of Madison*, 2004 WI 60, paras. 11, 14, 272 Wis. 2d 1, 680 N.W.2d 335.

31. *Id.* para. 42.

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decision cannot be collaterally attacked in another proceeding.³² A charging party can challenge the PFC decision to dismiss the charges by seeking certiorari review.³³

The statutory appeal focuses solely on whether there is just cause to sustain the charges.³⁴ The respondent initiates an appeal by serving written notice on the PFC secretary within 10 days after PFC files its order.³⁵ Service on the secretary must be in person.³⁶ The secretary must certify the record to the clerk of circuit court within 5 days.³⁷ Unless otherwise agreed by the parties, trial is to be scheduled not be later than 15 days after an application by either party.³⁸ Trial is to the court on the record, but the court may require the return of further evidence.³⁹ No costs are allowed and the municipality pays the clerk's fees.⁴⁰ If the PFC's order is reversed, the respondent is reinstated and entitled to backpay.⁴¹ If the PFC's order is sustained, respondent has no further right of appeal.⁴²

Certiorari review is initiated by the respondent filing an action in circuit court and must be commenced with-

in six months of the PFC action the respondent seeks to challenge.⁴³ On certiorari, the court determines whether (1) the PFC exceeded its jurisdiction, (2) the PFC proceeded on a correct legal theory, (3) the PFC acted in an arbitrary, oppressive, or unreasonable manner that represented its will and not its judgment, and (4) whether the evidence was such that the PFC could reasonably make the determination at issue.⁴⁴ Most allegations of error in the disciplinary process are addressed on certiorari review, given the limited scope of review on the statutory appeal. In contrast to the statutory appeal, the circuit court's decision on certiorari review is subject to appellate review.

SUMMARY

Discipline of employees in protective services poses a unique challenge to municipalities. This challenge falls to the PFC, a body ordinarily comprised of citizens not trained in the law. Providing the PFC with independent legal counsel to assist it in managing the process and conducting the disciplinary hearing best insures a just resolution that will withstand judicial review.

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32. See, e.g., *City of Madison*, 2003 WI 76, para. 36 (Department of Workforce Development may not take jurisdiction over a discrimination complaint arising out of a PFC decision).

33. *Id.* para. 33 (holding that jurisdictional and legal errors of a PFC are generally reviewable on certiorari (citing *State ex rel. Kaczkowski v. Fire & Police Comm'rs*, 33 Wis. 2d 488, 500, 148 N.W.2d 44 (1967))).

34. Wis. Stat. sec. 62.13(5)(i).

35. *Id.*; see also *Truttschel v. Martin*, 208 Wis. 2d 361, 367, 560 N.W.2d 315 (Ct. App. 1997) (rejecting police chief's argument that respondent was required to first file an action in circuit court and then serve the board secretary in order to initiate a statutory appeal).

36. *Gibson v. City of Racine Police & Fire Comm'n*, 123 Wis. 2d 150, 153, 366 N.W.2d 144 (Ct. App. 1985).

37. Wis. Stat. sec. 62.13(5)(i).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *State ex rel. Enk v. Mentkowski*, 76 Wis. 2d 565, 574-76, 252 N.W.2d 28 (1977).

44. *Gentilli*, 2004 WI 60, para. 19.