



**DETROIT
BOARD OF POLICE COMMISSIONERS**

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MEMORANDUM

TO: Dana Nessel, Michigan Attorney General; Loren Khogali, Executive Director American Civil Liberties Union of Michigan

FROM: Bryan Ferguson, Board of Police Commissioners Chairman

DATE: May 25, 2023

RE: Board of Police Commissioner Attorney Representation

Dear Attorney Dana Nessel and Director Loren Khogali,

The Board of Police Commissioners is requesting your support and assistance with removing external barriers to fulfilling its Charter-mandated responsibility to provide “*supervisory control and oversight of the Police Department*”. The Board has and continues to take steps to improve its service to Detroiters. This includes posting and filling open positions. However 2 of our most critical positions are being hindered – the Attorney to the Board and the Legal Assistant. Corporation Counsel is violating the Detroit City Charter by preventing the Recruiting Department from posting the Attorney to the Board and Legal Assistant positions on behalf of The Board of Police Commissioners.

Detroit City Charter states the following:

Sec. 7-804. Staff.

3. *...The Board may hire, in accordance with Article 6, Chapter 4, such additional staff as is necessary to carry out its duties. All members of the staff are under the direction of the Board...*

Sec. 7.5-201. Law Department.

1. Client and Representation.

...For purposes of conducting city business and in the performance of their duties therein, no branch or unit of government, department, agency, elected official or employee required or allowed to receive legal services by law, Charter, ordinance, city policy or contract, may solicit or obtain formal legal advice, or retain services or representation from an outside law firm or attorney, in the execution of their duties, without requesting and receiving the approval of Corporation Counsel, unless expressly allowed by Charter...

...Nothing in this section is intended to prevent any branch, officer or employee of city government from consulting with legal experts or convening meetings or hearings for the purpose of obtaining information necessary to execute their duties...

The Board of Police Commissioners has historically maintained an Attorney on staff, and is currently budgeted for an Attorney and Legal Assistant.

NAME	TITLE	DATE OF HIRE	LAST DAY WORKED	REASON
Jermaine Wyrick	Attorney	May 2017	August 2020	Un-Appointed
Linda Bernard	Attorney	December 2014	~October 2016	Un-Appointed
Aliyah Sabree	Attorney	February 2014	~September 2014	Accepted Another City Job
Celia Washington	Attorney	June 2008	~July 2013	Accepted Another City Job
Denise Hooks	Attorney	June 1999	~May 2008	Resigned Moved out of State

Oversight Best Practices and Current Barriers

To be effective and maintain the public's trust, oversight entities must be structurally and organizationally independent. The Board of Police Commissioners has limited independence in very few ways; and is challenged to provide meaningful oversight in several substantial ways.

As mandated by the Charter, Board staff reports up to the Board, not to DPD. However, the Board and its staff lack full autonomy to manage its operations, including its staff, in compliance with labor laws. For example, there has been strong discouragement from the Corporation Counsel-assigned attorney to appropriately mitigate risk to open investigations. In fact, the Corporation Counsel's assigned attorney threatened the Vice Chair of the Board and the Board Secretary with criminal charges because the Board put 2 staff members on Administrative Leave With Pay while the Auditor General, Office of Inspector General, and Internal Affairs conducts investigations involving their actions.

The Board is being hindered from building and maintaining a robust and comprehensive staff portfolio to mitigate dependency on and influence by DPD or other City departments in the management of its operations - budget, data analysis, policy, legal, technical, management, administrative support, etc. For example:

- The Board had its own appointed Attorney until August 2020. Corporation Council is misusing its Charter mandated powers to "prevent any branch, officer or employee of city government from consulting with legal experts or convening meetings or hearings for the purpose of obtaining information necessary to execute their duties" by denying BOPC approval to post for and appoint the budgeted Attorney to the Board and Legal Assistant.
- Other Board appointees have dependencies on the Board Attorney to effectively perform their functions. See attached Job Bulletin – Secretary to the Board of Police Commissioners which states as an example of duties, "Prepares various legal and investigation documents in conjunction with Board Attorney including, but not limited to, answers to inquiries, motions, legal memoranda, affidavits, stipulations, resolutions, case files, proofs of service and unit activity summaries."
- Both the Detroit Police Department and City Council appoint and maintain Attorney's and full legal teams to support their functions, independent of Corporation Counsel. See in the attached "Legislative Policy Division" for City Council is "staffed to offer City Council independent legal, fiscal and planning advice", of which David Whittaker, Esq. is the Director. See also attached

“Detroit Police Department Organizational Chart” where the Legal Advisor is 2nd Deputy Chief Grant Ha, Esq. with direct reports for Police Law and Police Labor. DPD’s Legal Division has a \$1.2M budget! Clearly, the Board is being singled out in this denial!

Commissioners and staff should be free of conflicts of interest that put oversight in jeopardy. For example:

- There is a clear conflict of interest for a Corporation Counsel-assigned attorney to be the sole legal advisor to a Board charged with providing independent oversight in the interests of the public. In addition, Corporation Counsel-assigned attorneys have demonstrated repeatedly that their purpose and intent is to provide simple legal opinions to primarily advise the Board what it **can’t** do. On the contrary, any person or entity that hires an attorney would expect that attorney to spend time gaining an understanding of the client’s goals and intentions; and assist that client in developing motions, language, resolutions, and policies to meet the goals within the limitations of the law.
- See the attached response from Corporation Counsel to Commissioner Willie Bell on February 24, 2015 (emphasis Corporation Counsel’s):

***Response to Sub-Question 1.B.:** It is not possible to identify in advance, as you request, the instances in which the Corporation Counsel would or would not represent members of the Board of Police Commissioners, as each decision would have to be made based on the individual facts and circumstances.*

Please note, however that Article 7.5, Chapter 2, of the 2012 Detroit City Charter, titled “Law Department” Describes the duties and responsibilities of the Law Department and the Corporation Counsel. Sec. 7.5-201, Paragraph 1., states in part:

*“[The] Corporation Counsel represents the City of Detroit as a body corporate and **may** represent its branches of government, departments, agencies, elected officials and employees as required or allowed by law, Charter, ordinance, city policy or contract.”*

In addition, Sec. 7.5-203 states, in part:

*“[t]he Corporation Counsel **shall** defend all actions of proceedings against the City...Upon request, the Corporation Counsel **may** represent any officer or employee of the City in any action or proceeding involving official duties.”*

Accordingly, it is the duty of the Corporation Counsel to defend actions against the City government as a whole, but it is within the discretion of the Corporation Counsel to represent any employee or officer. In addition, we note that Chapter 13, Article 11, of the Detroit City Code, entitled “Defense And Indemnification Of Employees Against Damage Suits, Claims, Etc.”, being Sections 13-11-1 through 13-11-9, provides the terms, conditions, and procedures upon which the city defends claims made against employees, officers, and agents.

Note here a **direct** conflict of interest for an attorney appointed to “defend the actions against the City government as a whole” (inclusive of DPD), to also be charged with providing legal counsel around the decisions of a Board that is charged with independently operating in the interests of the public.

Response to Sub-Question 3.A: ...Even if there were sufficient information to draw a conclusion, we would decline to answer as our response could be prejudicial to our ability to defend against any lawsuits or prosecutions that could be brought against public officials, if any circumstances existed that could be interpreted as a violation of the Open Meetings Act...

Note again a **direct** conflict of interest, to the point that the attorney refuses to answer the question for risk of incriminating his other client. Is the Board not also his client?

Response to Sub-Question 2.B: We regret that we cannot answer this question as it does not seek any legal advice or opinion; rather, it appears to request a political analysis, evaluation, and/or projection of future results or circumstances, or, in the alternative, to request a policy determination of what is in the best interest of the public health, safety, and welfare. Accordingly, we are unable to provide an answer and respectfully suggest that you direct your question to those persons whose training, expertise, and/or duties qualify them to respond to your request.

Note that an attorney hired by a client would, based on the terms of the employment, conduct such research and answer such questions. This Board is charged with operating in the best interest of the public’s safety; and needs an attorney on staff committed to assist with achieving that goal. While Corporation Counsel implies they do not have the “training, expertise, and/or duties qualify them to respond”, they now deny the Board the ability to recruit an attorney who can respond. I might add that the Board had an attorney when Corporation Counsel Conrad Mallett served on the Board and the attorney frequently responded to questions.

- In the interest of the public, the Board voted to err on the side of the citizen’s testimony in cases where an officer fails to capture body worn camera footage per policy. See attached “20230131_Opinion – Body Worn Camera – BOPC_delivered.pdf” where in 2 opinions from Attorney Adam Saxby, the Board is advised that their decision was not “legally defensible”. Attorney Saxby did not work with the Board to develop a resolution or language that would meet the Board’s need to protect the public from DPD members escaping responsibility for policy violations by conveniently failing to record the event on their Body Worn Camera, as required by DPD policy. Attorney Saxby instead defended his position by quoting language from both the “Detroit Police Department (DPD) Manual Directive Citizen Complaints 102.6” and “Office of Chief Investigator – Standard Operating Procedures (OCI SOP)”; both documents of which are within BOPC’s scope to develop and modify if necessary. Attorney Saxby further supports his position by referencing the “Detroit Police Officers Collective Bargaining Agreement (CBA)”; an agreement that this Board was not permitted to assist in negotiating or providing written input to the City’s negotiating team! See attached “Mayor Mike Duggan

Transmittal_BOPC Recommendations for Union Contracts.pdf" and the response from Labor Relations Director Keith Worthy "1210_001.pdf".

Call to Action

The Board of Police Commissioners requests that you support and take action on the following:

Prohibit Corporation Counsel from denying BOPC approval to post for and appoint the budgeted Attorney to the Board and Legal Assistant. Please see the attached job descriptions. The following Charter-Mandated responsibilities of BOPC require dedicated independent legal expertise:

- *"...establish policies, rules and regulations..."*
- *"...imposing or reviewing discipline..."*
- *"...subpoena witnesses, administer oaths, take testimony, and require the production of evidence. To enforce a subpoena or order for production of evidence or to impose any penalty prescribed for failure to obey a subpoena or order, the Board shall apply to the appropriate court..."*
- *"...When a matter is referred to fact finding, the secretary to the board and the respondent employee shall attempt to agree upon a person to act as a fact finder. The fact finder must be an attorney..."*

Sincerely,



Bryan Ferguson, Chairman Board of Police Commissioners